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THE INTERNATIONAL JOINT COMMISSION
BETWEEN THE UNITED STATES OF AMERICA
AND THE DOMINION OF CANADA

BY
CHIRAKAIKARAN JOSEPH CHACKO

THE INTERNATIONAL JOINT COMMISSION

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THE UNITED STATES OF AMERICA AND
THE DOMINION OF CANADA

BY

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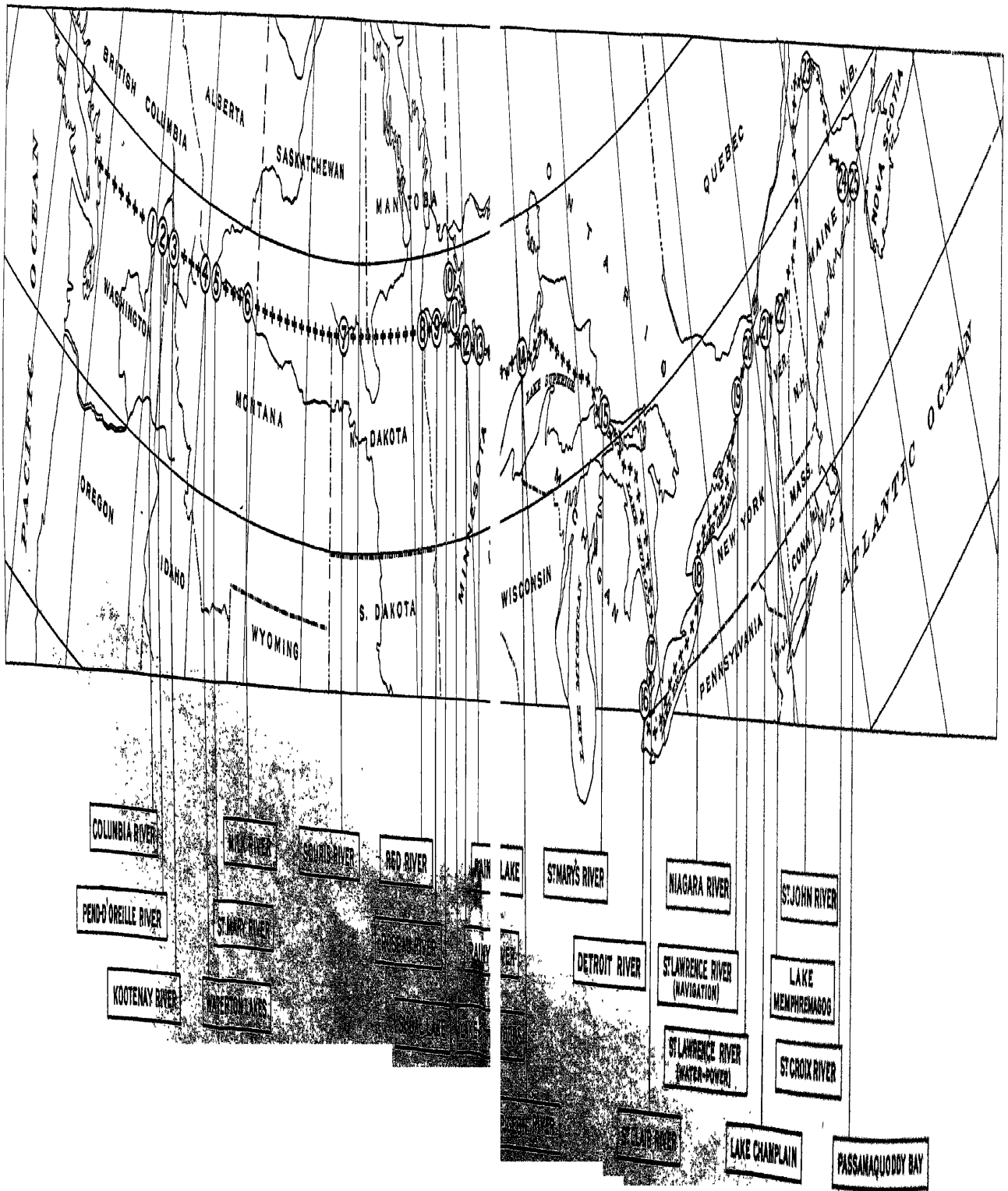
To

HARRIET WESTBROOK DUNNING

BELOVED GRANDMOTHER, TRUSTED AND HONORED FRIEND

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INTERNATIONAL JOINT COMMISSION WATERWAYS PROBLEMS



NOTES ON THE MAP¹

The accompanying map is designed to suggest the sources of international problems along the frontier between Canada and the United States. It does not pretend to be exhaustive, as no one can foretell where questions may arise along this very long boundary; on the other hand it is not confined to questions which have actually been before the International Joint Commission, but includes also several waterways where, because of physical or other circumstances, cases are likely to arise some time in the future. In the following paragraphs these international problems—past, present, or future—are briefly outlined.

1. COLUMBIA RIVER:

This important waterway rises in Upper Columbia Lake, in British Columbia, flows north and then south around the Selkirk Mountains, crosses the international boundary into the State of Washington, and empties into the Pacific Ocean. Several problems may arise in the valley of the Columbia, on one side or the other of the International Boundary. One that came before the Commission in 1928, for investigation and report under the provisions of Article IX of the Treaty of 1909, involves complaints from owners of land in Stevens County, State of Washington, of damage to their property by fumes from the smelter at Trail, B. C. A preliminary hearing in this matter was held in Northport, Wash., in October, 1928. The investigation was still in progress in January, 1929.

2. PEND D'OREILLE RIVER:

This river rises in the State of Washington, crosses the boundary into British Columbia, and empties into the Columbia. A project has been under consideration in the State of Washington involving the irrigation of 1,700,000 acres of land, with water

¹ The map with the explanatory notes have been used through the kind permission of Lawrence J. Burpee, Esq., Secretary of the Canadian Section of the International Joint Commission.

from this river. Such a diversion would, it is alleged, endanger the power potentialities of approximately 500,000 h. p. in Canada. The situation is described as one for very careful investigation. This matter is not at present before the International Joint Commission.

3. KOOTENAY RIVER:

This river rises in British Columbia, not far from the source of the Columbia, and flows south across the international boundary into the State of Idaho. It then takes a great bend and flows north again into Kootenay Lake in British Columbia, finally discharging into the Columbia, a few miles north of the international boundary. Its utilization for water power as well as in connection with the reclamation of arable lands now subject to overflow has been investigated on both sides of the boundary. In 1927 the Creston Reclamation Company Limited applied to the Commission for permission to construct certain permanent works in and adjacent to the channel of the Kootenay River in British Columbia. In 1928 the Commission issued its Order approving the application.

4. WATERTON LAKES:

These lakes lie across the international boundary, partly in Glacier Park, Montana, and partly in Waterton Park, Alberta. The Irrigation Development Association of Alberta urged in 1921 the desirability of utilizing these lakes as storage reservoirs for irrigation purposes. On the other hand, national parks interests in both countries oppose such use as prejudicial to the parks. No cases at present are before the Commission.

5-6. ST. MARY AND MILK RIVERS:

These rivers rise in Montana, the former in the mountains and the latter in the foothills, and flow across the boundary into Alberta, the latter returning to Montana after a course of about one hundred miles. Article VI of the Treaty of 1909 places upon the Commission the responsibility of directing the measurement and apportionment of the waters of these two streams for irrigation. By an Order issued October 4th, 1921, the Commission instructed the Reclamation officers of the two Governments as to how the provisions of Article VI were to be carried out.

7. SOURIS RIVER:

This river rises in Saskatchewan, flows across the international boundary into South Dakota, and, after a great bend, back again into Manitoba, discharging into the Assiniboine River. The availability of this stream for irrigation purposes has been, it is understood, considered by the Reclamation Service of Canada. No case at present before the Commission.

8. RED RIVER:

Rises in Minnesota and flows north across the international boundary into Manitoba. North Dakota, of which this river forms the eastern boundary, created in 1919 a Drainage and Flood Control Commission, and requested the co-operation of Manitoba and Minnesota. Improvements in the river channels south of the boundary designed to take care of flood discharge, might it is alleged endanger interests on the Canadian side. Not at present before the Commission.

9. ROSEAU RIVER:

This river rises in Minnesota and after receiving the waters of a branch which rises in Manitoba west of the Lake of the Woods, the stream flows northwest across the international boundary into Manitoba, and empties into the Red River. Intensive drainage into the river in Minnesota, and proposed improvements in the channel in Manitoba, have given rise to complaints on either side. The matter was referred to the Commission in December, 1928, for investigation and report.

10. SHOAL LAKE:

In 1913 the Greater Winnipeg Water District filed with the Commission an application for authority to divert for domestic and sanitary purposes the waters of Shoal Lake, which lies to the west of the Lake of the Woods, and is connected therewith by a channel. In January, 1914, the Commission issued its order approving of the diversion of an amount not to exceed one hundred million gallons per day. This was considered sufficient to meet the needs of the Winnipeg District for some years to come, without prejudicing navigation and power interests on the Lake of the Woods and Winnipeg River.

11. LAKE OF THE WOODS:

In June, 1912, the Governments of the United States and Canada referred to the Commission for investigation and report certain questions relating to the levels and overflow of this lake, through which the international boundary passes. As a great many interests, national and international, were affected, including those of navigation, agriculture, forestry, fisheries and water-power, the matter was gone into with unusual care. The Commission submitted its report in 1917, recommending certain levels which it was believed would best serve all the interests concerned in both countries. Provision was made both for an International Board of Control and also for a Domestic Board to look after purely Canadian interests. At the request of the two Governments, the Commission drafted a Treaty, which was subsequently signed, creating these two boards, which have now been in operation for several years.

12. RAINY RIVER:

This river, forming part of the international boundary, flows from Rainy Lake into the Lake of the Woods. Two applications affecting navigation have been before the Commission, one on behalf of the Watrous Island Boom Company, (1913), and the other on behalf of the International Lumber Company, (1916). The Commission approved both applications, on terms that adequately protected all other interests on the river.

13. RAINY LAKE:

Inter-related with the Lake of the Woods problem is the question of providing increased storage on Rainy Lake and other waterways above that lake for power purposes. These lakes are all boundary waters. The Commission made a partial investigation of this matter in connection with the Lake of the Woods case, but did not feel called upon at the time to make any final recommendations. In 1925 the two Governments referred to the Commission for investigation and report certain questions relating to the levels of Rainy Lake. That investigation is still in progress (January, 1929).

14. PIGEON RIVER:

The Pigeon River Lumber Companies sought authority to develop water power on this river, which is a boundary stream, flow-

ing into the north-west side of Lake Superior. Their application was made to the United States Government, which referred it to the Federal Power Commission in Washington. It has not yet been brought before the International Joint Commission.

15. ST. MARY'S RIVER:

A boundary stream connecting Lake Superior with Lake Huron. In May, 1913, the Commission issued its Orders in connection with the Applications of the Michigan Northern Power Company, of Michigan, and the Algoma Steel Corporation, of Ontario, for authority to develop water power at Sault Ste. Marie. These applications involved very important interests including the levels of Lake Superior. The Orders provide for diversion for power purposes and also for compensatory works in the interests of navigation, the whole being placed under an International Board of Engineers which reports from time to time to the Commission.

16. DETROIT RIVER:

In October, 1912, the Governments of the United States and Canada requested the Commission to investigate and report upon certain projected works in connection with the Livingstone Channel, in the Detroit River, designed to prevent cross currents dangerous to navigation. The Commission filed its report in April, 1913, recommending a dyke along the west side of the channel. By agreement between the two Governments the channel was widened and the dyke extended in 1919, and again in 1921, provision being made for such compensatory works as might be found necessary to safeguard the levels of boundary waters.

17. ST. CLAIR RIVER:

This is a boundary river connecting Lake Huron with Lake St. Clair. In December, 1916, the Government of the United States applied to the Commission for approval of the dredging of a channel in the St. Clair River near the town of Port Huron, Michigan. In its approval of the proposed works the Commission provided that a submerged weir should be constructed to compensate for the consequent lowering of the levels of Lake Huron.

18. NIAGARA RIVER:

Under the terms of the Treaty of 1909 the diversion of water for power purposes from Niagara Falls on this boundary river

is limited to 36,000 second feet on the Canadian side and 20,000 second feet on the American side. Works now constructed are capable of utilizing the full permissible diversion. The U. S. Corps of Engineers in 1920 filed a report embodying the results of an exhaustive study of the situation, and recommended that the total diversion be increased to 80,000 second feet, one-half of which to be assigned to each country. This would involve a revision of Article V of the Treaty. Inter-related with the question of these diversions is that of the preservation of the scenic beauty of the Falls, and the provision of compensatory works for the regulation of Lake Erie and the restoration of its levels for navigation. In 1923 the two Governments appointed the International Niagara Board of Control to supervise and control the diversion of water at Niagara Falls. In 1926 the Governments created the Special International Niagara Board to investigate and report upon plans for the preservation of the scenic beauty of Niagara Falls. In January 1929, a Treaty was signed increasing the authorized diversion at the Falls by 10,000 second feet on each side. Applications have also been made to the U. S. Federal Power Commission for permits for the diversion of water below the Falls for power purposes. The Niagara situation has not been before the International Joint Commission.

18. BOUNDARY WATERS :

In 1912 the Governments of Canada and the United States requested the Commission to investigate and report upon the extent and causes of the Pollution of Boundary Waters, and to recommend suitable remedies. This very important and intricate investigation extended over several years and involved elaborate bacteriological and engineering surveys. The Commission submitted its final report in 1918 embodying its conclusions and recommendations. The same year the Governments requested the Commission to prepare and submit a draft convention designed to carry out the Commission's recommendations, and in 1920 this draft was submitted.

19. ST. LAWRENCE RIVER NAVIGATION :

In January, 1920, the Governments of Canada and the United States referred to the Commission for investigation and report a number of questions designed to bring out the best means of securing from the waters of the Upper St. Lawrence their maximum

efficiency in terms of navigation and water power. The engineering features were looked into by a special technical board, while the Commission directly investigated the economic side of the problem. The results of both were embodied in an elaborate report filed with the Governments in December, 1921, and including the Commission's conclusions and recommendations. In accordance with one of these recommendations, the Governments afterwards created a large International Board of Engineers, as well as a National Committee on each side. The Engineers reported in 1926, the American Committee in 1927, and the Canadian Committee in 1928.

20. ST. LAWRENCE RIVER WATER POWER:

Several projects having to do with the development of power from the upper St. Lawrence were investigated by the former International Waterways Commission. Two applications have been before the International Joint Commission, one on behalf of the St. Lawrence River Power Company, and the other on behalf of the New York and Ontario Power Company, both in 1918. In the former the Commission issued an interim order for five years. In 1922 the Company applied for and was granted a further continuance of the works. In 1928 the Company asked for permission to increase its works. In view of the larger problem of the development of the St. Lawrence a decision on this application was postponed. Similar considerations led to a postponement of the decision in the application of the New York and Ontario Power Company. The Beauharnois Light, Heat and Power Company has obtained the authority of the Quebec Government, and is seeking that of the Dominion Government, for a power canal on the St. Lawrence between Lake St. Francis and Lake St. Louis. This matter has not been before the Commission.

21. LAKE CHAMPLAIN:

The international boundary between Canada and the United States crosses the upper end of this lake not far from the point where the Richelieu River leaves the lake, flowing north into the St. Lawrence. No application has yet been before the Commission involving these waters.

22. LAKE MEMPHREMAGOG:

In April, 1920, the United States Government transmitted to the Commission a petition on behalf of certain towns on the

United States side of Lake Memphremagog complaining of damage by flooding due to the raising of the level of the Lake by a dam at its outlet. The two Governments subsequently decided to appoint engineers to investigate the levels of this lake.

23. ST. JOHN RIVER :

In 1909 the Governments of the United States and Canada appointed a special International Commission to investigate and report upon the conditions and uses of the St. John River, part of the upper waters of which constitute the international boundary between Maine and New Brunswick. That Commission made its final report in 1916. In 1925 the New Brunswick Electric Power Commission applied to the International Joint Commission for authority to develop power at Grand Falls. This Application was granted. In 1926 the St. John River Power Company, having taken over the rights of the New Brunswick Electric Power Commission, sought and obtained authority to carry out the same works.

24. ST. CROIX RIVER :

In 1914 the St. Croix Water Power Company, of Maine, and the Sprague's Falls Manufacturing Company, of Canada, applied for approval of certain power works at Grand Falls in the St. Croix River, which is a boundary stream between New Brunswick and Maine. This application was approved. In 1919 Canadian Cottons Limited of Montreal filed an application for a power house at Milltown, on the same river. The company subsequently abandoned the project and withdrew its application. In 1923 the State of Maine applied for authority to erect and repair certain fishways in the St. Croix River. The Application was granted.

25. PASSAMAQUODDY BAY :

This bay is at the entrance to the Bay of Fundy, and through it passes the international boundary. A project has been under consideration for the development of water power from the tides in this Bay. The Application (January, 1929) has not yet reached the Commission.

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It remains to add that I alone am responsible for all statements of fact and expressions of opinion.

JOSEPH CHACKO

SEPTEMBER 11, 1931.

LIST OF ABBREVIATIONS

<i>A. J. I. L.</i>	<i>American Journal of International Law.</i>
<i>Br. and For. State Papers</i>	<i>British and Foreign State Papers.</i>
<i>Cong. Rec.</i>	<i>United States Congressional Record.</i>
<i>N.R.G.</i>	<i>Martens: Nouveau Recueil Générale des Traites.</i>
<i>Papers of the I. J. C.</i>	<i>Papers Relating to the Work of the International Joint Commission.</i>
<i>Sen. Ex. Doc.</i>	<i>United States Senate Executive Document.</i>
<i>Sen. Doc.</i>	<i>United States Senate Document.</i>
<i>U. S. For. Rel.</i>	<i>Foreign Relations of the United States.</i>

Abbreviations of Cases before the International Joint Commission :

<i>Algoma</i>	<i>Algoma Steel Corporation, Ltd.</i>
<i>B. F. E. P. B. Co.</i>	<i>Buffalo and Fort Erie Public Bridge Company.</i>
<i>Creston R. Co.</i>	<i>Creston Reclamation Company.</i>
<i>G. W. W. District</i>	<i>Greater Winnipeg Water District.</i>
<i>I. L. Co.</i>	<i>International Lumber Company.</i>
<i>L. W. R.</i>	<i>Lake of the Woods Levels Reference.</i>
<i>L. C. I.</i>	<i>Livingstone Channel Investigation.</i>
<i>M. N. P. Co.</i>	<i>Michigan Northern Power Company.</i>
<i>N. B. E. P. Com.</i>	<i>New Brunswick Electric Power Commission.</i>
<i>N. Y. O. P. Co.</i>	<i>New York and Ontario Power Company.</i>
<i>P. B. W. R.</i>	<i>Pollution of Boundary Waters Reference.</i>
<i>R. R. I. Co.</i>	<i>Rainy River Improvement Company.</i>
<i>S. F. Mfg. Co.</i>	<i>Sprague's Falls Manufacturing Company, Ltd.</i>
<i>St. Croix W. P. Co.</i>	<i>St. Croix Water Power Company.</i>
<i>St. John R. P. Co.</i>	<i>St. John River Power Company.</i>
<i>St. Lawrence R. I.</i>	<i>St. Lawrence River Navigation and Power Investigation.</i>
<i>St. Lawrence R. P. Co.</i> ..	<i>St. Lawrence River Power Company.</i>
<i>St. M. and M. Rivers</i> ...	<i>St. Mary and Milk Rivers.</i>
<i>W. I. B. Co.</i>	<i>Watrous Island Boom Company.</i>

INTRODUCTION

"WE rejoice in our long friendship and in permanent peace, and it would be a short-sighted view that either of us has any real interest which is to be promoted without regard to the wellbeing of the other and the considerate treatment which conditions good will. I am saying this personal word as much to the people of the United States as to the people of Canada; it breathes neither complaint nor criticism, but a keen desire for the cooperation of the closest friends, each secure in independence and in the assurance of amity."¹

These were the remarks which Mr. Charles Evans Hughes, then Secretary of State of the United States, made during his address before the Canadian Bar Association at Montreal on September 4, 1923. The distinguished official who at the present time adorns the Supreme Court of the United States in the capacity of Chief Justice, had touched during his address upon the subject which forms the theme of this study — *the International Joint Commission between the United States and Canada*.

This commission was created in pursuance of Article VII of the treaty of January 11, 1909² concluded between the

¹ Hughes, Charles Evans, *The Pathway of Peace* (New York & London, 1925), p. 17.

² Redmond, *Treaties and Conventions of the United States*, Senate Document No. 348, 67th Cong., 4th Sess. (Washington, 1923), p. 2611; also see *British and Foreign State Papers* (London), vol. 102 (1908-1909), p. 140; Charles, *United States Treaties* (Washington, 1913), pp. 39, 47; Martens, *Nouveau Recueil Général de Traités* (Leipzig, 1911), series 3, tome iv, pp. 208-216; *United States Foreign Relations* (Washington, 1914), 1910, p. 553; Ogilvie, *International Waterways* (New York, 1920), p. 268.

United States and Great Britain. It consists of six members, three representing the United States and three the Dominion of Canada. It was established, speaking generally, to inaugurate an ordered régime for the use, obstruction or diversion of the international waters of the long chain of rivers and lakes through which the common boundary between the United States and the Dominion of Canada passes from the Atlantic to the Pacific. Any use, obstruction or diversion of these waters, either by the United States or Canada, within their respective territorial jurisdictions would not have appeared, prior to the treaty of 1909, to be contrary to international law. When, for example, in 1895 Mexico complained that the water in the Rio Grande River "had been so greatly diminished" in consequence of digging irrigation ditches in parts of Colorado and New Mexico as to cause "great damage and hardship of numerous inhabitants of Mexico", the Mexican Minister was advised: "That the rules of international law imposed upon the United States no duty to deny to its inhabitants the use of the water of that part of the Rio Grande lying wholly within the United States, although such use resulted in reducing the volume of water in the river below the point where it ceased to be entirely within the United States, the supposition of the existence of such a duty being inconsistent with the sovereign jurisdiction of the United States over the national domain."³

Nevertheless it is more than obvious that any diversion, use or obstruction of international waters on one side, inconsiderate of the welfare and well-being of the people on the other side, might prove highly prejudicial to the interests of navigation, irrigation and the development of hydro-electric power. Over these uses so far as they relate

³ Moore, John Bassett, *Digest of International Law* (Washington, 1906), vol. i, pp. 653-654.

to the boundary waters between the United States and Canada, the Joint Commission has jurisdiction. But it may be noted that under the treaty of 1909, the Commission is not restricted to dealing with the boundary waters alone. Any matter on which the contracting parties are at variance and which may arise on the vast stretch of the "common frontier" from the Atlantic to the Pacific, may be submitted to the Commission, either for an arbitral decision⁴ or for an investigation,⁵ report and recommendation, as was recently done in the Trail Smelter case⁶ which concerned transboundary interests but not interests in the boundary waters. Consequently, considering the extent of the entire boundary including the boundary waters, between the United States and Canada, and the limitless resources which form the property of the people on both sides of the line, it was appropriate to create a joint commission for the beneficial administration of these resources.

When an examination is made of the various powers which the International Joint Commission is competent to exercise under the treaty of 1909, for the adjustment and settlement of all questions which may arise on the international boundary "involving the rights, obligations or interests" of the Governments and the people who face each other on that common frontier, the conclusion is reached that the Joint Commission is invested with powers that may conveniently be characterized as judicial, administrative, investigative and arbitral.

Speaking from the standpoint of the judicial powers of the Commission, it is no exaggeration to say that there appears to be no other organization endowed with jurisdiction over waters of international concern, which is clothed

⁴ Article x; see *infra*, appendix A.

⁵ Article ix; *ibid.*

⁶ See Investigative Powers, *infra*, Chapter vi.

with such clear and important judicial powers as are delegated to the Joint Commission. "The people of no two countries in the world, except the people of Canada and the United States, have the opportunity of appearing personally before an international tribunal of any kind with original and final jurisdiction in their respective countries, for the purpose of presenting facts bearing upon the exercise of their common right to the use of a common property."⁷ Compared therefore with certain other international river commissions, such as those on the Danube and the Rhine, the Joint Commission seems to stand out pre-eminently as a judicial body that functions as a court of law, while the European commissions appear primarily in administrative roles. This fundamental distinction may perhaps be explained. The Danube and the Rhine Commissions seem to have had their genesis in a need for improved navigation for purposes of international commerce. The Treaty of Paris of 1856, which first provided for the European Commission on the Danube, declares that the purpose of that organization was "to design and have executed [faire executer] works for the improvement of the mouths of the Danube up to Isakcha and the neighboring seas", and "to fix tolls for these works".⁸ In like manner the Treaty of Vienna, 1815, created the Central Commission on the Rhine in order to "establish a perfect control" over the regulation of the navigation of the Rhine and to "constitute an authority which may serve as a means of communication between the states of the Rhine upon all subjects relating to navigation".⁹ In other words, these commissions were intended

⁷ *Papers Relating to the International Joint Commission* (Ottawa, 1929), p. 105.

⁸ Chamberlain, Joseph P., *The Regime of International Rivers: Danube and Rhine* (New York, 1923), p. 285.

⁹ Moore, *op. cit.*, vol. i, p. 628; also Chamberlain, *op. cit.*, pp. 185-186.

to safeguard international navigation on the Danube and the Rhine.

When one turns from the Danube and the Rhine Commissions to the Commission on the Rio Grande River, which forms the boundary between the United States and Mexico, a different situation is presented. The International Boundary Commission provided for by Article I of the treaty of March 1, 1889,¹⁰ between the United States of America and the United States of Mexico appears to be primarily concerned with questions of diversions of the waters of the Rio Grande for irrigation purposes. Practically all the controversies that have occurred on this river seem to involve questions of diversion.¹¹ Thus looked at from the point of view of their functions, the European Commissions and the International Boundary Commission are considerably different from the Joint Commission. This last body is not *primarily* concerned with either navigation or irrigation. Article VIII of the treaty of 1909 prescribes an order of precedence in which priority is given to "Uses for domestic and sanitary purposes". "Uses for navigation" follow, while uses "for power and irrigation" come last in the list.

The reason for this mode of preference appears rather clear; in general the Great Lakes and connecting waters have been opened to navigation to both the United States and the Dominion through a series of treaties extending from 1783 to 1909.¹² Article I of the treaty of 1909 also emphasized this mutual right of navigation of both the contracting parties, particularly the privilege which was ex-

¹⁰ Malloy, *Treaties, International Acts, Protocols and Agreements between the United States of America and Other Powers* (Washington, 1910), vol. i, p. 1167; also see pp. 1192-1193.

¹¹ See Moore, *op. cit.*, pp. 653-657 for controversies.

¹² See *infra*, chap. i.

tended by the United States to Canadians to navigate the non-boundary waters of Lake Michigan which is exclusively within the territorial jurisdiction of the United States. Apparently because of the fact that the provisions concerning the use of the boundary waters in earlier treaties related primarily to rights of navigation, the Contracting Parties found it necessary in the treaty of 1909 to make some provision concerning other uses, such as those for domestic and sanitary purposes and for power and irrigation. The inclusion of provisions for the latter uses made it necessary to establish the order in which they should rank in cases of conflict. The order finally adopted was that which obtains at common law.¹³

From the standpoint of irrigation also an interesting feature may be noted. As a rule very little use seems to have been made of the waters of the Great Lakes and connecting waterways for irrigation purposes. Nevertheless there was one important case of irrigation in which the Joint Commission was concerned. That involved the waters of the St. Mary and Milk Rivers.¹⁴ But inasmuch as these rivers are cross-boundary waters, and since such waters are outside the definition of boundary waters as laid down by the Preliminary Article of the treaty of 1909, it may be remarked that Article VI of that treaty, which deals with the administration of the waters of the St. Mary and Milk, appears to be almost a treaty within the treaty, and, therefore, not subject to the judicial powers which the Joint Commission exercises over boundary waters.

The fact, nevertheless, that should be borne in mind is that however different in their origins they may be, and whatever the distinctions in the nature or degree of their respective judicial, administrative, or other powers, all these

¹³ Farnham, Henry Philip, *Water Rights* (New Haven, 1904), p. 137.

¹⁴ See Administrative Powers, *infra*, chap. v.

various commissions fundamentally aim at securing the impartial and equitable use of the international waters to the nations interested in them either because of navigation rights arising from treaties, or riparian rights to their domestic and sanitary uses, or property rights to obstruct or divert them for purposes of power or irrigation. Thus according as circumstances demanded, nations of Europe and America have created agencies of international cooperation to take charge of and to administer waters of an international concern. It seems appropriate to observe that where two or more nations are rightfully interested in the fullest uses available from international waters, the method of using permanent international commissions rather than the meanderings of dilatory diplomacy as a means of handling such waters and regulating their sundry beneficial uses without preference or prejudice, would appear to be the safest and shortest path to international peace.

Consideration remains to be given to the Joint Commission in its role as an investigative agency. Under Article IX of the treaty of 1909 the two Governments may refer to the Commission any question arising on their common frontier, for purposes of examination, report, conclusion and recommendation. The Danube and Rhine Commissions are not specifically empowered to act as investigative agencies. The Rio Grande Commission has exercised such a function to a certain extent.

“The operations of the international commission organized under the convention of March 1, 1889, between the United States and Mexico to determine disputes which have arisen by reason of changes in the fluvial boundary of the two countries, having been extended for another year, until December 24, 1896, by a convention signed October 1, 1895, occasion was taken at the same time, by a friendly understanding between the two Governments, to enlarge the duties

of the commissioners by charging them to examine and report touching questions of irrigation and storage dams on the Rio Grande.”¹⁵ And further, “The International Water Boundary Commission, as the result of their consideration of the subject of the ‘equitable distribution of the waters of the Rio Grande’, ‘recommended an international dam and reservoir’ . . .”¹⁶ During the course of the present year (March 4, 1931), Mr. Lawrence M. Lawson, American Commissioner on the Rio Grande Commission, has been “authorized to proceed with preliminary surveys and office studies of conditions on the lower Rio Grande, including the development of engineering plans for storage dams and flood control and such hydrographic and topographic investigations as will give a full understanding of the availability, conservation, and use of the water supply in that region. He has also been authorized to proceed with proposed investigations on the lower Colorado River, with a view to determining the effect of the storage of water at the proposed Hoover Dam, and the development of international plans for proper channel control and removal of the menace of such discharges as may be expected from uncontrolled drainage area sources.”¹⁷

Hence it may be inferred that in matters of investigation the Rio Grande Commission does not act as a permanent commission of inquiry. For an evaluation of the Joint Commission as an investigative agency, one may turn to the provisions for Commissions of Inquiry in the Hague Conventions of 1899 and 1907, as well as the Bryan Peace Treaties of 1913 and 1914, and the Covenant of the League of Nations. In its right to make recommendations to the

¹⁵ Moore, *op. cit.*, vol. i, pp. 765-766.

¹⁶ *Ibid.*, p. 766, and references cited therein.

¹⁷ Press Releases, Publications of the Department of State, Weekly Issue no. 79, Publication No. 178, Saturday, April 4, 1931, p. 240.

two Governments, the Joint Commission is akin to a commission of conciliation. These aspects of comparison may be very briefly examined.

There are various modes of settling international differences, failing diplomacy. One such method is that of creating, through agreement between the parties concerned, *ad hoc* commissions of inquiry, with a view to having them investigate and report on the facts and circumstances as well as the law involved in the dispute. The objective is obvious in this procedure. An impartial investigation often furnishes the basis for a settlement, and pending investigation by a commission of inquiry, whether composed of nationals or neutrals, the tension and unrest which might otherwise lead to open rupture, relax and lose force. The Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes seem to have recognized this fact. The nations which signed the Convention of 1899 recommended that in matters of international difference which did not involve vital interests or national honor, and "arising from a difference of opinion on points of fact, the States at variance should . . . institute an International Commission of Inquiry to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation".¹⁸ The reports of these commissions were not to be regarded as possessing the character of arbitral awards.¹⁹

One of the best instances wherein the services of a Commission of Inquiry under the Hague Convention of 1899

¹⁸ Article ix, Convention of 1899; see Hyde, *International Law* (Boston, 1922), vol. ii, p. 106; F. W. Holls, *The Peace Conference at the Hague* (New York, 1900), pp. 203-220; also Maurice Bokanowski, *Les commissions internationales d'enquête* (Paris, 1908); André Le Ray, *Les commissions internationales d'enquête au xxme siècle* (Saumur, 1910).

¹⁹ Article xiv, Convention of 1899, Holls, *op. cit.*, p. 389.

brought about a salutary termination of hostile feelings between two great nations occurred during the Russo-Japanese War of 1904. In the so-called North Sea Incident which happened on the night of October 21-22, 1904, off the Dogger Bank, the conduct of the naval fleet under the Russian Admiral Rojdestvensky in opening fire upon certain English fishing vessels, on the assumption that there were Japanese torpedo boats among them, caused grave concern to both England and Russia.²⁰ The matter was submitted, through special agreement between the two nations, to an International Commission of Inquiry, set up in accordance with the provisions of the Hague Convention of 1899. The duty of this Commission, composed of five admirals, representing the United States, Great Britain, France, Russia and Austria, was to discover the facts, "particularly upon the question of where the responsibility lies, and upon the degree of the blame" attaching to the subjects of other countries in the event of their responsibility being established by the inquiry.²¹ The commission after proper inquiry into the circumstances of the case reported its findings that there were no Japanese boats as alleged, that the firing on the English vessels was unjustifiable, and that the

²⁰ See Gooch, G. P. and Temperley, H., *British Documents on the Origins of the War*, vol. iv, London, 1929, p. 5 *et seq.*; Moore, in *Proceedings of the Eleventh Mohonk Arbitration Conference*, 1905, p. 43; Hyde, *op. cit.*, vol. ii, p. 106; Higgins, Pearce, *The Hague Peace Conferences* (Cambridge, 1909); Hershey, Amos S., *The Essentials of International Public Law and Organization* (New York, 1929), p. 463.

²¹ Article 52, Declaration, Nov. 25, 1904, cited in Higgins, *op. cit.*, p. 168; also see *American Journal of International Law*, vol. ii (1908), p. 929; for Report see *ibid.*, p. 931; Scott, James Brown, *The Hague Court Reports* (New York, 1916), p. 417; for other cases: "Tavignano", "Camouna", and "Gaulois" under convention between France and Italy, dated May 20, 1912. See also A. J. I. L., vol. xvi (1922), p. 485 for the case of the "Tubantia" under the Treaty of March 30, 1921, between Germany and the Netherlands.

responsibility lay with the Russian admiral, although the commission wanted to make it clear that its conclusions²² "were not of a nature to cast any discredit upon the military qualities or the humanity"²³ of the admiral or of his squadron.

This report achieved two things: it furnished the basis for a heavy indemnity to be paid to Great Britain by Russia,²⁴ and it paved the way for the improvement of this mode of adjusting international differences in the Hague Convention of 1907.²⁵

Ever since the Hague Conventions, not only various European States but also several States in the western hemisphere have resorted to commissions of inquiry as a step in furthering the cause of international peace by a fact-finding process applied to international differences. Numerous treaties were concluded between the United States and other countries which incorporated this mode of adjusting controversies. The best known among these treaties are those connected with the name of a former American Secretary of State, the late Mr. W. J. Bryan, and are collectively called the Bryan Peace Plan.²⁶ The fundamental principles of this plan were: (1) that all disputes which have baffled diplomacy should be made the subject of investigation by an impartial body composed of five members of whom the majority should be neutral; (2) that such a body should be a "permanent" commission; (3) that the commission should complete its investigations within the period of one year, unless otherwise

²² *A. J. I. L.*, vol. ii (1908), p. 936.

²³ Hyde, *op. cit.*, vol. ii, p. 107; Scott, *Travaux de la Cour Permanente d'Arbitrage*, New York, 1921, p. 434.

²⁴ *Ibid.*

²⁵ Malloy, *op. cit.*, vol. ii, pp. 2230-2234.

²⁶ *A. J. I. L.*, vol. viii, pp. 565, 876; also *ibid.*, vol. ix, p. 175.

specified; (4) that during the period of investigation the parties should not resort to war; (5) that an investigation should take place only at the instance of one or more parties to the dispute; and (6) that there should be no obligation binding the parties to acquiesce in the findings or report of the commission.²⁷

The commission may, upon realizing that there is a failure on the part of the contracting parties to settle any dispute through the normal channels of diplomacy, volunteer its services, and "in such case is to notify both governments, requesting their cooperation in the investigation".²⁸ The commission, moreover, is to be afforded all necessary facilities to enable it to carry out its investigation and report its findings. The report is to be done "in triplicate, of which one copy is to be presented to each government, and the third retained by the commission".²⁹ After the submission of the report by the commission, the contracting parties are free "to act independently on the subject matter of the dispute. . . ." ³⁰ Because of this freedom of action in spite of the report of the commission of inquiry, there has been apparent a more appreciable willingness on the part of nations to enter into agreements providing for such commissions. The Bryan plan has been regarded as "practical because it takes shrewd cognizance of the susceptibilities of opposing states in seasons of conflict, and opens a welcome door to direct negotiation under fresh conditions which may

²⁷ Jessup, P. C., *The United States and Treaties for the Avoidance of War. International Conciliation*, no. 239, New York, 1928; Buell, Raymond Leslie, *International Relations* (New York, 1929), p. 624. The first treaty under the Bryan Peace Plan was that between the United States and Salvador, Aug. 7, 1913; see U. S. Treaty Series, no. 717.

²⁸ Hyde, *op. cit.*, vol. ii, p. 110.

²⁹ *Ibid.*

³⁰ *Ibid.*

produce accord".³¹ Even if the report of a commission is not adopted by the parties to a dispute, it may still serve as a basis, or suggest a means, for the settlement of the question either through "direct negotiation or by arbitration".³²

Article XII of the Covenant of the League of Nations declares:

The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.³³

This report is to be made "within six months after the submission of the dispute".³⁴ Further provision is made to the same end in Article XV. Here any party to the dispute may notify the Secretary-General of the League, "who will make all necessary arrangements for a full investigation and consideration thereof".³⁵ The Council, which may be regarded as playing the role of a commission of inquiry and conciliation, shall endeavor to bring about a settlement.³⁶ If this fails,

the Council, either unanimously or by a majority vote, shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.³⁷

³¹ For an excellent monograph on this subject see article by Prof. C. C. Hyde, "The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes", *British Year Book of International Law*, 1929, p. 96 *et seq.*

³² Hyde, *op. cit.*, vol. ii, sec. 558.

³³ Article xii, The Covenant of the League.

³⁴ *Ibid.*

³⁵ Article xv, par. i.

³⁶ *Ibid.*, par. 2 and 3.

³⁷ *Ibid.*, par. 4.

6. If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council cannot agree on a report, the Members reserve the right to take such action as would be "necessary for the maintenance of right and justice".³⁸ Where the dispute is established by the Council as having originated in a matter which "by international law is solely within the domestic jurisdiction" of one of the parties which claims it is such, the Council "shall make no recommendation as to its settlement". The Council may refer any case submitted under Article XV to the League Assembly; or one of the parties may do so within fourteen days after its submission to the Council. The report of the Assembly, if properly concurred in by the Council Members and a majority of the non-Council Members, excluding the parties to the dispute, shall have the same force as a unanimous report of the Council.³⁹

One of the fundamental differences between the League Council and the International Joint Commission seems to lie in the matter of reference. In the case of the former, any party to the dispute may effect a submission by giving notice to the Secretary-General of the League.⁴⁰ There is in addition a "friendly right" accorded each Member of the League under the provisions of Article XI of the Covenant⁴¹ whereby it is rendered competent "to bring to the attention of the Assembly or the Council any circumstance

³⁸ *Ibid.*, par. 7.

³⁹ *Ibid.*, par. 7-10.

⁴⁰ *Ibid.*, art. xv. See *passim*: Conwell-Evans, T. P., *The League Council in Action* (Oxford, 1929).

⁴¹ *Ibid.*, art. xi.

whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends".⁴² "Any war or threat or war", whether immediately affecting the Members of the League or not, is regarded as a matter of concern to the whole League and "the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations".⁴³ None of these methods of reference to and action by the League Assembly or Council or both obtains as regards the International Joint Commission. The Commission is not endowed with the power to initiate any inquiry merely upon information.

In brief, one notices a certain process of evolution in international thought and procedure affecting commissions of inquiry. Under the Hague Conventions of 1899 and 1907 it was necessary for the parties to a dispute to sign a special agreement in order to refer a dispute to an International Commission of Inquiry. This procedure was not adopted in the case of the Joint Commission which was established two years after the Second Hague Convention. Under Article IX of the treaty of 1909 either of the contracting parties may request the other party that a matter be referred for examination, report, conclusion and recommendation at the hands of the Joint Commission. In the Bryan Commission the reference seems to be directly to the commission rather than preceded by a request to the other government or party. In other words, the requirement for an agreement between the parties is omitted. Finally, in the Covenant of the League, not only is provision made that either party to a dispute may refer it to the League Assembly or Council, but also, that *any Member* of the League, party or non-party to the dispute, may bring infor-

⁴² *Ibid.*, par. 2.

⁴³ *Ibid.*, par. 1.

mation concerning a prospective rupture, whereupon the League has the power to set its machinery in motion to effect peace between the prospective combatants and thereby assure international understanding and good will.

The Covenant supplies few details concerning the procedure to be employed by the Council in settling a dispute submitted to it; in the case of the Joint Commission, Article XII provides for the adoption by the Commission of Rules of Procedure to be applied in cases submitted to it for decision. These Rules, "as far as applicable, shall apply to proceedings in all cases referred or submitted under Articles IX and X".⁴⁴

The primary duty of a commission of conciliation, as that term itself discloses, is one of conciliating or effecting accord between the parties to a controversy. It may be composed of an even number of nationals of the countries parties to the dispute, as in the case of the Joint Commission under Article IX of the treaty of 1909 between the United States and Great Britain, or of both nationals and neutrals. The states parties to the dispute are equally represented in the latter combination as in the case of the commission provided for between Norway and Sweden under Article III of the treaty of June 27, 1924.⁴⁵ In this commission of five Norway and Sweden have two representatives each, while the fifth member is either to be chosen jointly by the contracting parties, or in case they fail to agree, by the President of the Permanent Court of International Justice at the Hague, or if the President happens to be a national of either of the parties to the dispute, by the Vice-President of the Court.⁴⁶ In some conventions a single commissioner is provided for, who is the national of a third state, as in

⁴⁴ See Rules of Procedure, *infra*, Appendix B.

⁴⁵ Hyde, *Br. Year Bk.*, *loc. cit.*, p. 101.

⁴⁶ *Ibid.*

the agreement between Hungary and Switzerland of June 18, 1924.⁴⁷

As a rule, most commissions of inquiry fulfil the role of commissions of conciliation as well. The Convention between the United States and the Central American Republics signed on February 7, 1923, while making provision for an "International Commission of Inquiry", declares that that commission has the "right to recommend any solution or adjustments which in its opinion may be pertinent, just and advisable".⁴⁸ The "Permanent Conciliation Commission" provided for in Article V of the treaty between Italy and Switzerland, concluded on September 20, 1924, was entrusted with the task of furthering "the settlement of disputes by an impartial and conscientious examination of the facts and by formulating proposals with a view to settling the case".⁴⁹ The "General Convention of Inter-American Conciliation" concluded on January 5, 1929, declared that the duty of the commission of inquiry provided therein was "to procure the conciliation of differences subject to its examination by endeavoring to effect a settlement between the parties".⁵⁰ In brief, the function of a commission of conciliation is to make recommendations to the parties to a conflict with a view to conciliating them.

Under Article IX of the treaty of 1909 between the United States and Great Britain, the International Joint Commission seems to be empowered to fulfill the functions of a conciliation commission. Article IX declares that:

⁴⁷ Article iii, *League of Nations Treaty Series*, no. 887.

⁴⁸ Article i, *U. S. Treaty Series*, no. 717.

⁴⁹ *League of Nations Treaty Series*, no. 834.

⁵⁰ Article vi, *General Convention for Inter-American Conciliation*, *U. S. Treaty Series*, no. 780 (Washington, 1929), p. 10. See also the so-called Gondra Treaty, "The Treaty to Avoid or Prevent Conflicts between the American States", signed on May 3, 1923, at Santiago de Chile; *League of Nations Treaty Series*, no. 831.

“The International Joint Commission is authorized in each case . . . to examine into and report . . . together with such conclusions and *recommendations* as may be appropriate”, provided that such recommendations are within the terms of reference.

Here a question may be asked. According to the language of Article IX, the Commission has the necessary power to examine into and report its findings of fact upon any matter, together with its conclusions and recommendations. But suppose in a given case the Commission feels it can recommend a solution of a question or matter of dispute without holding any investigation, can it proceed to do so in the endeavor to conciliate the parties and secure to them justice and fair play? Or should the Commission conduct an examination “in each case”, form its conclusions and report its recommendations which may be the result of such findings? In the Livingstone Channel investigation the Commission made, as will be seen later, a recommendation even when it had not been called for. But it was a recommendation which became necessary as a result of the examination itself into the proposed project of a dike. The question that arises here, however, is whether in the absence of any investigation the Commission may venture a recommendation for the solution of any issue.

It has been pointed out that under the European practice the recommendations which a commission of conciliation may make to the parties creating the commission or utilizing its conciliatory services, “should be the product of an investigation elucidating questions at issue, and observing a procedure calculated to develop and disclose the contentions of the opposing states.” According to opinion in America, as reflected by the General Convention of Inter-American Conciliation, a commission of conciliation should be encouraged to investigate everything, but it should not be “obliged

to do so before pressing its recommendations".⁵¹ In other words, "Europe would safeguard a state against a mere weight of conciliatory opinion dealing harshly with its pretensions by minimizing the danger of recommendations having a political rather than a factual or legal basis. America, on the other hand, would seemingly welcome any recommendations serving in fact to produce accord."⁵² If this generalization is applicable to the various commissions of conciliation to which the United States is a party, and if Great Britain or the Dominion of Canada should acquiesce in it, then it may be observed that under Article IX the Joint Commission may make recommendations, whether dependent upon or independent of its investigations, provided that nothing in the terms of reference forbade such action. No doubt most of the time, as Mr. Charles Evans Hughes said at the International Conference of American States on Conciliation and Arbitration, on January 3, 1929, "investigation would precede conciliation". But he continues, "There is no reason why, if the parties can be brought to a settlement, it should not be done. There is no reason why we should not have machinery for that purpose, in the interest of peace, or why we should have a long inquiry, perhaps into a very complicated problem, before conciliation can be begun."⁵³

The establishment of commissions of inquiry and conciliation has helped to foster international peace. Since the Hague Convention of 1899, nations have concluded numer-

⁵¹ Hyde, *Br. Year Bk.*, *loc. cit.*, p. 108.

⁵² *Ibid.*

⁵³ Quoted by Hyde in *Br. Year Bk.*, *loc. cit.*, p. 106; also see Protocol of January 3, 1929, between Bolivia and Paraguay accepting the good offices of the International Conference of American States in Conciliation and Arbitration; *Proceedings of the International Conference of American States on Conciliation and Arbitration, Held at Washington, December 10, 1928-January 5, 1929* (Washington, 1929), p. 162.

ous agreements among themselves which have provided for investigative agencies to elucidate the facts or the laws involved in disputes arising among them. Such agencies have played the happy role of effecting accord and good will between states which would otherwise have remained at variance. But not one single commission in this entire galaxy is clothed with that aggregate of powers which is delegated to the International Joint Commission. This Commission under Article VI of the treaty of 1909 is an administrative agency to a certain extent like the commissions on the Rhine and the Danube; it is a court to protect the water rights of the contracting parties in so far as they affect the boundary waters under Articles III, IV and VIII; it is a commission of inquiry and conciliation under Article IX, and last, but not least, it is an arbitral tribunal, a miniature Hague Court, under Article X. Indeed this is a remarkable combination to perpetuate peace. It may well be that in the present state of international organization such powers would be entrusted only to a joint commission on which both parties are equally represented and in which no alien may cast a deciding vote.

When one considers the work of the Joint Commission and the part it has played in maintaining good will between the United States and Canada, one may feel assured that such commissions are to be regarded as desirable agencies for peace. More than that; their utility in other directions has equally to be recognized. The St. Lawrence River Navigation and Power investigation, conducted and concluded by the Joint Commission, and the most elaborate investigation on the question of the Pollution of the Boundary Waters, may be cited as two unrivaled examples of the international service which an agency like the Joint Commission is capable of rendering to the two nations responsible for its creation. As a fact-finding body, its conclu-

sions, undertaken in an international spirit, should be highly beneficial to the formulation of international policies. The treaty and protocol which the United States and Canada concluded on February 24, 1925,⁵⁴ to regulate the levels of the Lake of the Woods seems to be an example in point.

Finally, as an agency to educate public opinion on matters that might otherwise become a *casus belli* between nations, the value of the services of the Joint Commission may not be denied. There seems to be little or no doubt that in international relations public opinion plays an important part. "The aim of all rational and practicable activity for the permanent establishment of the world's peace, and for the promotion of justice, is and must always be the education of the world's opinion."⁵⁵ Joint commissions may help in this direction to a considerable extent.

In the following pages therefore a detailed study is presented of the International Joint Commission—the historic circumstances that led to its creation, the powers with which it is clothed, and the guarantee of peace which it offers to the nations responsible for its institution, composition and administration.

⁵⁴ See *A. J. I. L.*, vol. 19, no. 4, pp. 128-133; also *infra*, appendix D.

⁵⁵ Butler, Nicholas Murray, *The International Mind* (New York, 1912), p. 36.

CHAPTER I

THE INTERNATIONAL BOUNDARY

EVER since the momentous war on behalf of the independence of the American people, and their establishment as a separate nation, the territory which prior to that war had been under a single sovereign, has been divided by a boundary line into two distinct, independent, political entities known today as the United States of America and the British Dominion of Canada. This line separates the territories of the two nations over an approximate distance of 3500 miles, running westward from Passamaquoddy Bay on the Atlantic Ocean to the Fuca straits of Vancouver on the Pacific, through a stretch of 2000 miles of mostly navigable waters.¹ These waters comprise

the international portions of the St. Croix and St. John rivers, between the State of Maine and the Province of New Brunswick; the St. Lawrence River from Cornwall to Kingston; Lake Ontario, Niagara River, Lake Erie, Detroit River, Lake St. Clair, St. Clair River, Lake Huron, St. Mary's River, Lake Superior, the series of small rivers and lakes from Lake Superior over the height of land to Rainy Lake, Rainy Lake, Rainy River, and the Lake of the Woods, to that minute but very controversial point in diplomatic history, the northwest point of the Northwest Angle Inlet of the Lake of the Woods.²

¹ *Papers of the I. J. C.*, p. 101; for a complete description of the waterway, see *The St. Lawrence Waterway Project*, Senate Doc., no. 183, 69th Cong., 2nd Sess. (Washington, 1927), pp. 9-11, 17-22.

² *Papers of the I. J. C.*, pp. 107-108; Malloy, *op. cit.*, vol. i, pp. 619-623, 651-653, 815, 827, 2616-2619; Hill, *Leading American Treaties* (New York, 1922), p. 37; Senate Executive Doc., no. 47, 48th Cong., 2nd Sess., pp. 370-371, 376.

Of the entire system of waters through which the international boundary passes, the Great Lakes alone—Superior, Michigan (although the second largest lake, Michigan, is not a boundary water), Huron, Erie and Ontario—engulf an area of approximately 95,000 square miles, of which 60,770 square miles lie on the United States side of the boundary, and 33,940 on the Dominion side.³ The lakes form the largest bodies of fresh water in the world and serve as a system of natural reservoirs interconnected by several channels of restricted capacity and varying slope.⁴ Lake Superior is connected with Lakes Michigan and Huron by the St. Mary's River, 63.6 miles long, as well as the Sault Ste. Marie Canal, commonly known as the "Soo"; Lake Michigan is connected with Lake Huron on the northeast by the Strait of Mackinack, 48 miles in length; Lake Huron empties into Lake Erie via the St. Clair River, St. Clair Lake and the Detroit River; St. Clair River, which is 42 miles long, connects both Michigan and Huron with Lake St. Clair; Lake Erie is connected with Lake Ontario at Port Colborne by the Niagara River, as well as by the Welland Ship Canal, 26.73 miles long, recently built by the Canadian Government; Lake Erie is also connected with the Hudson River by the New York State Barge Canal, usually called the Erie Canal, 122.4 miles long, built in 1825 and deepened in 1907, connecting Buffalo with Troy, while a northwest extension of the same canal connects Lake Ontario at Oswego.⁵

³ *Seaway News* (Great Lakes-St. Lawrence Tidewater Association), Dec. 6, 1930.

⁴ Ritter, *Transportation Economics of the Great Lakes-St. Lawrence Ship Channel* (Washington, 1925), p. 11.

⁵ *Ibid.*, pp. 12-13; also see *Seaway News*, Dec. 6, 1930; *World Almanac* (New York, 1931), p. 773.

THE SITUATION ON THE BOUNDARY

One of the most striking features about these boundary and connected waters is that they form a highway for mid-continental commerce. Sometimes the commerce that passes through the St. Mary's Falls canals is regarded as the total volume of the commerce of the Great Lakes;⁶ nevertheless it is to be remembered that there is no detailed and accurate data available for the entire commerce on the Great Lakes.⁷ Whatever statistics are available are confined to the data furnished by some of the more important ports, numbering about 83 localities, while "there are approximately 300 minor lake ports not included in the records".⁸ With this limitation in view, it may be pointed out that as far back as 1894, during a period of 234 days, the freight borne on these waters alone exceeded 30,000,000 tons; this was "one fourth as much as the total freight carried by all the railroads of the United States during the whole year".⁹ A quarter century afterwards the commerce on Lake Superior alone exceeded 68,500,000 tons, carried via the St. Mary's Falls Canals in 733 vessels.¹⁰ In 1927 this aggregate reached the mark of about 83,500,000 tons, of which 50,000,000 tons consisted of iron ore,¹¹ 17,000,000 tons of coal, and 12,000,000 tons of grain. The value approximated for this ponderous tonnage was over one billion dollars. In both tonnage and value the commerce on Lake Superior has in-

⁶ MacElwee & Ritter, *Economic Aspects of the Great Lakes-St. Lawrence Ship Channel* (New York, 1921), p. 242.

⁷ Ritter, *op. cit.*, p. 117.

⁸ MacElwee & Ritter, *op. cit.*, p. 243.

⁹ Callahan, *Neutrality of American Lakes* (Baltimore, 1898), pp. 9-21.

¹⁰ Ritter, *op. cit.*, pp. 242-243.

¹¹ Smith, Russell, *North America* (New York, 1925), p. 377: "At Lake Superior ports 1,000 tons of ore thud and rumble into a boat in less than two hours".

creased during the past two decades by almost one hundred percent.¹²

The traffic on Lake Huron is primarily made up of the through commerce of Lakes Superior, Michigan and Erie, and secondly of limestone shipped from Rockport and Calcite. In 1926 Rockport shipped 1,847,413 tons, and Calcite 9,041,301 tons of limestone.¹³ The Canadian ports on the Georgian Bay receive about a million tons of coal annually from Lake Erie ports,¹⁴ while Lake Erie gets per year about 45,000,000 tons of iron ore from Lake Superior, about 33,000,000 tons of coal from Pennsylvania and West Virginia, and about 5,000,000 tons of limestone. Approximately 50% of the Canadian wheat is transhipped to boats suitable for passage through the Welland Canal to Montreal and Quebec.¹⁵ The Erie ports that handle the bulk of this trade are Detroit, Toledo, Cleveland and Buffalo. The commerce on Lake Ontario is chiefly carried on by the Canadian ports of Kingston, Toronto and Hamilton, as well as the American ports of Oswego and Ogdensburg, and is confined almost entirely to iron ore and grain.

For grain alone the regions contiguous to the international boundary waters are of extreme fertility. On a four-year average (1921-1924 inclusive) the wheat traffic on the Great Lakes totalled 66,033,000 bushels; the major share of this traffic either enters the United States and is exported from Atlantic coast ports, or is used for American mills. Out of the total during the four-year period only

¹² Bulletin no. 37, *Survey of Northern and Western Lakes* (Lake Survey Office, Detroit, April, 1928); House Doc., no. 253, (Washington, 1928), 70th Cong., 1st Sess.; *Transportation on the Great Lakes* (Washington, 1926).

¹³ "Lake Huron", *Encyclopedia Britannica* (14th Ed., 1929).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

19,137,000 bushels were exported via the Great Lakes. According to the United States Department of Commerce the present total of 66,033,000 bushels "might increase" to "143,028,000 bushels" in case a deep waterway to the ocean materializes.¹⁶

Wheat shipments from Canada are also important; shipments from Fort William and Port Arthur totalled 20,391,965 bushels.¹⁷ Of the entire Canadian shipments for that period, which amounted to 203,399,000 bushels, it is anticipated that at least 115,229,300 bushels might be available for movement to the ocean in case the proposed St. Lawrence deeper ship canal is constructed. This prospective amount does not include the present movement of the 50,000,000 bushels via the St. Lawrence.¹⁸

As far as other exports in general are concerned, 82.8% of the agricultural implements produced in the United States, 80.4% of the automobiles, 73.2% of the packing house products such as meat and lard, 67.7% of metals, 65.4% of glass, 61.3% of rubber goods and about 50% of the furniture, not to mention items such as leather goods and chemicals or other commodities, are all produced in the territory adjacent to the international waters.¹⁹ In 1924 the United States commerce in the Great Lakes totalled "over 23% of the ton-mileage of all the railroads of the United States—90,000,000,000 ton-miles on the Lakes as compared with 388,000,000,000 ton-miles on the railways".²⁰ Towards the close of 1929 the shipping on the Lakes exceeded 150,000,000 tons

¹⁶ *Great Lakes-to-Ocean Waterways*, U. S. Dept. of Commerce, series 4 (Washington, 1927), pp. 23-24; see Ritter, *op. cit.*, pp. 271-274, for other grains.

¹⁷ Average for 4 years, 1920-21 to 1923-24.

¹⁸ *Great Lakes-to-Ocean Waterways*, *op. cit.*, p. 24.

¹⁹ Ritter, *op. cit.*, p. 106.

²⁰ *Great Lakes-to-Ocean Waterways*, *op. cit.*, p. 5, also see p. 100.

of freight, "avoiding all possible duplicate counts", and was valued at 2,500,000,000 dollars.²¹ This traffic was moved by a fleet of 750 vessels, and to facilitate its movement there has been invested in the improvements of terminals, grain elevators, ore docks, coal docks, other merchandise docks, cold storages and various mechanical accessories for handling freight, \$300,000,000 or more.²² Improvements in the connecting channels alone have cost the United States, up to 1930, a sum of about \$45,000,000 and about \$115,000,000 in harbors and basins at the ports of the Great Lakes.²³ The steel industry of Pittsburgh and Ohio, the Lake Superior mining industry, the agricultural developments of the northwest, the wealth of the corn belt, are all predicated on marine transportation on the Great Lakes.²⁴

Along with these facts and figures, the importance of the canals connecting the Great Lakes and other waters may also be very briefly reviewed from the standpoint of cargo movements alone. In 1910 the Detroit River had a freight of 73,625,602 tons, valued at \$771,294,005, while in 1929 that tonnage aggregated 110,719,845, with a value of \$1,195,774,326. Sault Ste. Marie had 62,636,218 tons in 1910, valued at \$654,010,844, while twenty years later it had a cargo of 92,622,017 tons, having a value of \$1,000,327,459. Duluth-Superior, in 1910, had 36,684,578 tons of freight with a cost of \$284,049,072, while in 1929 the same had

²¹ MacElwee, *Review in part on Dr. Moulton's "St. Lawrence Navigation and Power Project"* (Bulletin no. 47, Great Lakes-St. Lawrence Tidewater Ass'n., Washington, 1930), p. 18.

²² Pardee, John Stone, *Analyzing the Factors*, Bulletin no. 43, *op. cit.*, p. 7.

²³ *Ibid.*, p. 8.

²⁴ *World Almanac*, 1931, p. 773; "On June 30, 1923, there were 2,286,000 gross tons of American shipping on the Great Lakes. Of this the Standard Oil group owned 586,000 tons and the United States Corporation 237,000 tons." Russell Smith, *op. cit.*, footnote 2 on p. 377.

risen to 60,385,767 tons priced at \$485,631,945. The Erie Canal carried a cargo of 3,073,412 tons in 1910, but in 1929 it decreased to 2,876,100 tons.²⁵

On the Canadian side the Welland Canal had 2,326,290 tons in 1910, which grew within nearly twenty years to 4,769,866 tons; the St. Lawrence Canal carried 2,769,752 tons of freight in 1910, while by 1929 this figure had risen to 5,718,651 tons.²⁶

The importance of these canals may be made more impressive by comparing their cargoes with those of the canals of some other countries. The Suez Canal in 1910 had 16,581,898 tons of cargo; in 1929 it had 33,466,014 tons. The Panama Canal in 1915 had 4,888,454 tons, in 1929 it carried 30,663,000 tons. The Manchester Canal (England) had 4,937,631 tons in 1910; in 1929 it had 6,558,589 tons. The Kiel Canal (Germany) in 1910 carried 7,231,458 tons, while in 1929, 21,613,088 tons passed through.²⁷

Finally a word may be added here about the power situation along the international boundary waters. On the St. Mary's River, the Niagara, the Upper St. Lawrence and elsewhere along the line, there are hydro-electric power plants, both American and Canadian, that have absorbed millions of dollars. At Niagara on the Canadian side there are three large power plants: the Canadian Niagara Power Company with a nominal operating capacity of 100,000 horsepower, the plant formerly operated as the Ontario Power Company with a capacity of 180,000 horsepower, and the plant formerly owned by the Toronto Power Company with an operating capacity of 125,000 horsepower. These two latter companies are at present under the ownership and management of the Hydro-Electric Power Commission on behalf

²⁵ *World Almanac*, 1931, p. 773.

²⁶ *Ibid.*

²⁷ *Ibid.*

of the cooperating municipalities of Ontario. The Commission has also constructed in the Niagara River between Lakes Erie and Ontario the plant known as the Queenston-Chippawa Power development. The power house of this plant contains 9 units with a total capacity of about 550,000 horsepower and is regarded as the largest single hydro-electric system in the world.²⁸

On the United States side of the Falls there are certain companies such as the Niagara Falls Company with its 140,000 horsepower.²⁹ Out of the total output of New York State, which for 1930 was 1,805,195 horsepower,³⁰ a considerable percentage was produced in the Niagara regions.

Apart from these regions, there is power produced by the St. John River Power Company at Grand Falls, New Brunswick, in that section of the St. John River which is regarded as flowing from the international boundary portion. Part of their power is delivered in the State of Maine. There is also power produced by the St. Croix Water Power Company on the St. Croix River on the side of the United States. There is also considerable power generated at the Soo on the St. Mary's River by the Michigan Northern Power Company. Numerous other instances may be cited to show how closely the power situation is knit up with the international boundary. In this connection it is worth remembering that the plans for the proposed Great Lakes-St. Lawrence Deep Waterway include "power houses with an ultimate installed capacity of from 2,619,000 to 2,730,000 horsepower and permit the eventual development with installed capacity of approximately 5,000,000 horsepower", which is the full

²⁸ *Ibid.*

²⁹ War Department Doc., no. 1039, p. 55, Report of Col. C. C. Kellar (1921).

³⁰ *World Almanac*, 1931, p. 321.

power potentiality of the St. Lawrence River³¹ between Lake Ontario and Montreal harbor.

Along with the foregoing facts which render the importance of the international boundary waters sufficiently obvious, it must be remembered that sixteen States of the American Union—Ohio, Indiana, Kentucky, Illinois, Iowa, Missouri, Kansas, Nebraska, North and South Dakota, Montana, Wisconsin, Minnesota, Michigan, Pennsylvania and New York, as well as the Canadian Provinces of Alberta, Saskatchewan, Manitoba and Ontario, depend largely on these waters for transportation. In the vicinity of the waters, from the Atlantic to the farthest point on Lake Superior along the international boundary, there are approximately 40,000,000 people³² distributed on either side of the line, who look upon these waters as their common property; they ardently cherish the right to the use of these waters for domestic and sanitary purposes, for irrigation, industrial and power purposes, as well as for summer enjoyments.

This mutual interest coupled with the fact of independent jurisdictions, which obtained on either side of the boundary, and also the consequent inalienable rights of the states and provinces fronting the common waters, engendered in the past differences of opinion and interest in matters pertaining to their regulation and distribution.³³ Some adequate and permanent machinery, therefore, had to be created as the joint expression of the two nations involved and interested, in order to settle not only the differences already pending between them but also to provide for future contingencies and thus safeguard the Great Lakes and related international waters with a view to their equitable utilization

³¹ The St. Lawrence Waterway Project, Sen. Doc., no. 183, *op. cit.*, p. 47.

³² *Ibid.*, p. 2.

³³ Moore: *Digest of Arbitrations* (Washington, 1898), vol. i, *passim*.

for the benefit of all concerned. No one nation acting in a strictly individual and independent capacity could hope, with sufficient assurance to international tranquility, to cope with the different and difficult problems arising on these waters. Joint regulation and administration by the sovereign Governments on either side of the boundary, and cooperation between their states and provinces as well as among their respective riparian citizens and subjects alone could secure the proper uses of these waters to the fullest extent required for domestic and sanitary purposes, and for irrigation or power. Any careless obstruction or diversion by one or both countries of any part of these waters might adversely affect navigation, irrigation or other uses, and might prove a stumbling-block to the full development of the friendly and neighborly relations between them. Hence as far back as 1894 statesmen both in the United States, Great Britain and Canada, started by gradual steps to shape administrative thought on both sides of the boundary for the sake of creating a joint device with which to control, regulate and distribute the boundary and related waters without any unwarranted preference or prejudice to the people on either side. What these various steps were in the long-drawn but constructive process of Anglo-American diplomacy will be evident from a brief examination of the various treaties and other agreements concluded between the United States and Great Britain.

TREATIES PRIOR TO THE CREATION OF THE COMMISSION

(1) *On Navigation*

In 1783 Great Britain recognized the thirteen original colonies that revolted against her rule in the New World as the United States of America. This recognition was given by the definitive treaty⁸⁴ of peace and amity concluded with

⁸⁴ Definitive Peace Treaty, 1783, art. i, Malloy, *op. cit.*, vol. i, p. 586; also see Morris, *International Arbitration and Procedure* (New Haven, 1911), p. 39.

the United States at Paris in that year. That instrument conceded to each of the contracting parties, after laying down a certain boundary, territorial jurisdiction in boundary waters on their respective sides up to the line itself.³⁵ Article VIII of that treaty declared that "the navigation of the River Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States". This right was conceded to Great Britain under the misapprehension that the Mississippi had its sources somewhere near the international boundary. In one section, this boundary was to run from the most northwestern point of the Lake of the Woods "on a due west course to the river Mississippi", thence by a line "to be drawn along the middle of the said river Mississippi", until it should intersect the thirty-first degree of north latitude. It was not long afterwards ascertained that a line drawn due west from the most northwestern point of the Lake of the Woods would not strike the Mississippi,³⁶ and therefore provision was made by a subsequent treaty for the joint survey of the country in that section of the continent.³⁷ The fact to be noted here is that the principle involved in the provisions of Article VIII of the Treaty of 1783 has guided the relations of the two countries, as is well proved by the subsequent treaties.

The next treaty concluded between the two countries re-

³⁵ Moore, *International Law Digest*, vol. i, p. 674; see also the case of the American vessel *Grace* in which the Canadian Judge McDougall held that "the lake waters on either side of the international boundary are under the exclusive municipal jurisdiction of the respective countries", *ibid.*, p. 675, and notes there cited.

³⁶ Moore, *op. cit.*, vol. i, p. 625; also see *Final Report on Lake of the Woods Reference* (Washington, 1917), pp. 133-134.

³⁷ Moore, *op. cit.*, vol. i, p. 625; see Jay Treaty, 1794, art. iv, Malloy, *op. cit.*, vol. i, pp. 590-607; or see Senate Executive Doc., no. 47, p. 1222, notes; also Ogilvie, *op. cit.*, pp. 262-263.

garding navigation on the boundary waters was the Jay Treaty of 1794. This was the first treaty concluded with a foreign power after the adoption of the Constitution under the new form of government recognized since 1783.³⁸ According to this treaty it was reciprocally agreed that British subjects and United States citizens as well as the Indians living on both sides of the boundary, should at all times have the privilege of passing and re-passing by land or inland navigation into the respective domains of each country "on the continent of America (the country within the Hudson's Bay only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other".³⁹ The second section of this Article added that there should be no discriminating duties on account of nationality, while the last part, equally important, declared that

no higher or other tolls or rates of ferriage than what are or shall be payable by natives, shall be demanded on either side; and no duties shall be payable on any goods which shall merely be carried over any of the portages or carrying places on either side, for the purpose of being immediately re-embarked and carried to some other place or places.⁴⁰

Two years later an explanatory article was appended to the above Article by means of a supplementary agreement concluded at Philadelphia on May 4, 1796. Therein it was provided "that no stipulations in any treaty subsequently concluded by either of the contracting parties with any other State or Nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse

³⁸ Senate Document, no. 47, p. 1222.

³⁹ *Ibid.*, p. 380; Moore, *op. cit.*, vol. i, p. 674; Malloy, *op. cit.*, vol. i, pp. 590-607.

⁴⁰ Malloy, *op. cit.*, vol. i, p. 592; art. iii, Treaty of 1794.

and commerce secured by the aforesaid third article " of the treaty of 1794, to the citizens of the United States, the British subjects and the Indians specified in that treaty. These persons further " shall remain at full liberty freely to pass and repass, by land or inland navigation " into the territories of the nations concerned, for such purposes as are acknowledged in Article III of the treaty of 1794.⁴¹

A third treaty comes into existence in 1814, ordinarily referred to as the Treaty of Ghent. This treaty further clarified the boundary line along the middle of the " Iroquois or Cataraqua ", i. e. St. Lawrence, river where the 45th degree north latitude strikes it, towards the west through the Great Lakes to the Lake of the Woods.⁴² The Convention concluded in 1815 for regulating commerce and navigation contained a provision that there should be no discriminating duties on exports or imports or even on the vessels employed in these processes of trade. The Convention further provided that the intercourse between the United States and the British possessions in the West Indies and " on the continent of North America shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights, with respect to such an intercourse ".⁴³

The year 1817 marked a high point in practical expression of the friendly and peaceful relations between the United States and Great Britain. The Rush-Bagot agreement of that year provided for the limitation of naval armaments on the Great Lakes, to " one vessel not exceeding 100 tons burthen and armed with one eighteen-pound cannon " on

⁴¹ Sen. Exec. Doc., no. 47, 48th Cong., 2nd Sess., pp. 395-396; *ibid.*, p. 407.

⁴² Hertslet: *Commercial Treaties*, vol. ii, p. 383; Sen. Exec. Doc., no. 47, p. 411; Malloy, *op. cit.*, pp. 612-624.

⁴³ Malloy, *op. cit.*, p. 624, Art. 2 of the Treaty of July 3, 1815.

Lakes Ontario and Champlain, and not more than two vessels of like burthen and armament on the upper lakes. All other armed vessels were to be forthwith dismantled and "no other vessels of war" were to be built or armed on the lakes.⁴⁴ Since that time, it may be happily observed, these international waters have been without warships, fortresses or guns; no military or naval instrumentalities of any kind have been built subsequently to guillotine international peace and the neighborly good will between the two nations.⁴⁵

Twenty-five years after the agreement of 1817, another treaty was concluded bearing again on the international waters. The Webster-Ashburton Treaty of 1842 was a further indication that both Great Britain and the United States were cementing and safeguarding their relations on their common boundary. Article II of that treaty specified: "It being understood that all the water communications and all the usual portages⁴⁶ along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from shore of Lake Superior to the Pigeon River as now actually used, shall be free and open to the use of the citizens and subjects of both countries."⁴⁷ Article III referred to the River St. John, which forms a part of the boundary between the State of Maine and the Province of New Brunswick, but otherwise is wholly within the Province, and declared that the navigation of that river "shall be free and open to both parties, and shall in no way be obstructed by either".⁴⁸ Coming down to Article VII of the treaty, one reads that

⁴⁴ Moore, *op. cit.*, vol. i, p. 692; *American State Papers*, vol. iv, p. 202, also see Sen. Exec. Doc., no. 9, 52nd Cong., 2nd Sess.; 11 Stat. 766.

⁴⁵ Root, *Miscellaneous Addresses* (Cambridge, 1917), p. 155.

⁴⁶ Cf. page 57; Jay Treaty, 1794, art. iii.

⁴⁷ Hertslet, *op. cit.*, vol. vi., p. 856; Malloy, *op. cit.*, vol. i, p. 668; Sen. Exec. Doc., no. 47, p. 435.

⁴⁸ Sen. Exec. Doc., no. 47, pp. 434-36-39.

"the channels in the River St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channels in the River Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name, shall be equally free and open to the ships, vessels, and boats of both parties."⁴⁹

The northwest boundary treaty of 1846 accorded to British subjects the right to navigate the Columbia river or rivers to the ocean, "it being understood that all the usual portages⁵⁰ along the line" described in Article II of the treaty,

shall . . . be free and open. In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this Article shall be construed as preventing or intending to prevent, the Government of the United States from making any regulations respecting the navigation of the said river or rivers not inconsistent with the present treaty.⁵¹

This last clause in other words seems to have emphasized that the United States maintained its right as a nation to full police powers within its own territory.

On the fifth of December, 1850, a protocol was signed by Viscount Palmerston, then the British Secretary for Foreign Affairs, and Abbot Lawrence, Esquire, Envoy Extraordinary of the United States, regarding the cession of Horse-Shoe Reef to the United States for the purpose of constructing a lighthouse which would be of great advantage to the important commerce and navigation of the two nations, on

⁴⁹ *Ibid.*

⁵⁰ *Cf.* art. iii, Treaty of 1794, p. 56.

⁵¹ Malloy, *op. cit.*, vol. i, p. 657.

the Great Lakes as well as on the Niagara River.⁵² This matter is referred to only to show that both the United States and Great Britain have been undertaking various necessary measures to safeguard their navigation on the international waters.⁵³

In 1854 another treaty was ratified and proclaimed. Heretofore Canadians had enjoyed the use of American waters, and Americans the use of Canadian waters, either touching the international boundary or adjacent thereto; but it is during this year that a specific provision was made pertaining to the River St. Lawrence, especially to that portion which is entirely within the jurisdiction of Canada. Article IV of the treaty says:

It is agreed that the citizens and inhabitants of the United States shall have the right to navigate the River St. Lawrence, and the canals in Canada used as the means of communicating between the great lakes and the Atlantic Ocean, with their vessels, boats, and crafts, as fully and freely as the subjects of Her Britannic Majesty, subject only to the same tolls and other assessments as now are, or may hereafter be, exacted of Her Britannic Majesty's said subjects; it being understood, however, that the British Government retains the right of suspending this privilege on giving due notice thereof to the Government of the United States.

It is further agreed that if at any time the British Government should exercise the said reserved right, the Government of the United States shall have the right of suspending, if it think fit, the operations of article iii of the present treaty, in so far as the Province of Canada is affected thereby, for so long as the suspension of the free navigation of the River St. Lawrence or the canals may continue.

It is further agreed that the British subjects have the right

⁵² 9 Stat. 380 and 627; 10 Stat. 343; the lighthouse was erected in 1856; Malloy, *op. cit.*, vol. i, pp. 663-664.

⁵³ See other problems on boundary waters, in this chapter, pp. 63-68.

freely to navigate Lake Michigan with their vessels, boats, and crafts so long as the privilege of navigating the River St. Lawrence, secured to American citizens by the above clause of the present article, shall continue; and the Government of the United States further engages to urge upon the State governments to secure to the subjects of Her Britannic Majesty the use of the several State canals on terms of equality with the inhabitants of the United States.⁵⁴

The most interesting feature of this article is its reciprocal character; citizens of the United States now could navigate the St. Lawrence just as British subjects could navigate Lake Michigan. It should be noted here that these waters are not boundary waters. Consequently, in each case, navigation does not appear as of "right" but of "concession".⁵⁵ If the British Government should abrogate the privilege on the St. Lawrence, the United States had equally the right to terminate the same on Lake Michigan, and vice versa. This treaty, however, was changed twelve years later. "During the war of the Rebellion, owing partly to the predominance of protectionists in the Congress" of the United States, who disliked the free trade with Canada, and "partly due to the feeling against Canadians arising out of various incidents connected with the war,"⁵⁶ the United States gave notice of the termination of this treaty", which had been rendered terminable after a period of ten years, upon one year's due notice by either of the contracting parties. On March 17, 1866, the treaty was ended.⁵⁷

The relations between the two countries remained

⁵⁴ Malloy, *op. cit.*, vol. i, p. 671.

⁵⁵ Schuyler, *American Diplomacy and the Furtherance of Commerce* (London, 1886), p. 289.

⁵⁶ Cf. the Alabama claims.

⁵⁷ Schuyler, *op. cit.*, p. 290.

strained.⁵⁸ The refusal of Great Britain to litigate the question of her liability to make reparation for the depredations of the "Alabama" and the "Florida" prevented agreement on the other questions over which the two countries were at odds. This state of affairs continued until 1871 when the British Government commissioned Sir John Rose to go to Washington; he "arrived on January 9, 1871, dined at once with Fish" (then Secretary of State of the United States), "discussed their problem till the morning hours, communicated with his government at home, and drafted shortly afterward the memorandum of what soon became the Treaty of Washington".⁵⁹ A joint High Commission composed of representatives of both the countries drafted the treaty, which was concluded on May 8, ratified on May 24, and proclaimed by the President of the United States on July 4, 1871.⁶⁰

Two articles of this treaty relate to the navigation of the St. Lawrence River. Article XXVI reads:

The navigation of the River St. Lawrence, ascending and descending, from the forty-fifth parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada not inconsistent with such privilege of free navigation.⁶¹

Article XXVII. The Government of Her Britannic Majesty engages to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on

⁵⁸ Morley, *The Life of William Ewart Gladstone* (New York, 1911), vol. ii, p. 79.

⁵⁹ Sears, *American Foreign Relations* (New York, 1927), p. 351.

⁶⁰ *Ibid.*, p. 353.

⁶¹ Treaty of 1871, art. xxvi, first par.; Malloy, *op. cit.*, vol. i, p. 711.

terms of equality with the inhabitants of the Dominion; and the Government of the United States engages that the subjects of Her Britannic Majesty shall enjoy the use of the St. Clair Flats canal on terms of equality with the inhabitants of the United States, and further engages to urge upon the State governments to secure to the subjects of Her Britannic Majesty the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line between the possessions of the high contracting parties, on terms of equality with the inhabitants of the United States.⁶²

In these two articles the term "right" as referring to navigation is not used; instead, the term "privilege" is adopted. This usage appears significant; for at one time the United States claimed the navigation of the St. Lawrence "as a right".⁶³ The British Commissioners were willing to grant it as a "concession",⁶⁴ but they insisted that the United States should reciprocate with a similar right on Lake Michigan. This the American Commissioners refused.⁶⁵ The result was a compromise. The United States was to have the "privilege" of navigating the St. Lawrence River and the various canals of the Dominion, just as Great Britain was to enjoy the privilege of navigating the American sections of the rivers Yukon, Porcupine and Stikine in Alaska,⁶⁶ as well as certain canals in the United States. This exchange of privileges is to be "forever". The term "right" does not appear in the treaty.

⁶² *British and Foreign State Papers*, vol. 101, p. 224; Malloy, *op. cit.*, vol. i, pp. 815, 827; Cushing, *Treaty of Washington* (New York, 1873), p. 280; U. S. Foreign Relations, 1873, vol. iii, pp. 261-424; Hertslet, *op. cit.*, vol. 13, pp. 970-982; Moore, *op. cit.*, vol. i, p. 674.

⁶³ Schuyler, *op. cit.*, pp. 289-290.

⁶⁴ Phillimore, *International Law* (London, 1879), vol. i, pp. 242-245.

⁶⁵ Schuyler, *op. cit.*, p. 290.

⁶⁶ See Moore, *op. cit.*, vol. i, pp. 635, 631-636; see also *American State Papers*, vol. vi, pp. 757-758, 769, 772; 19 *Br. and For. State Papers*, 1088.

Long before the treaty of Washington had been concluded, this point of "right" had been prominent in diplomatic instructions and correspondence between the two countries. For example, when Mr. Clay became the Secretary of State of the United States, he instructed his Minister in London, Mr. Gallatin, on the following point: "If the United States were disposed to exert within their jurisdiction a power over the St. Lawrence similar to that which is exercised by Great Britain, British subjects could be made to experience the same kind of inconvenience as that to which American citizens are now exposed. The best, and for descending navigation the only channel of the St. Lawrence, between Barnhart Island and the American shore, is within our limits; and every British boat and raft, therefore, that descends the St. Lawrence comes within the exclusive jurisdiction of the United States. The trade of the upper province is consequently ours."⁶⁷ Mr. Gallatin realised that there were but two alternatives open to the United States; either to insist on the right and assert it when an opportunity presented itself, or "to waive for the present, without renouncing, the right, and to make a commercial arrangement which may remove or lessen the evils now complained of."⁶⁸ But this position he subsequently seems to have relaxed; in his letter to Mr. Everett who succeeded him as Minister to London, he says,

The argument derived from natural law is strong. The precedents . . . are, I fear, against us. The most formidable objection is to be found in forty years' acquiescence, and in having accepted by the treaty of 1794 a part only, and very limited, of the navigation, unaccompanied by any assertion or reservation of the right. I have no doubt of the free use being ultimately allowed by Great Britain, not as a matter of right, but because

⁶⁷ *Gallatin's Writings* (Philadelphia, 1879), vol. ii, p. 313; see Schuyler, *op. cit.*, p. 286.

⁶⁸ *Ibid.*, p. 287.

it is clearly their interest to afford every facility to draw our produce to Quebec.⁶⁹

Negotiations stood at this stage until 1854, when the treaty of that year made certain reciprocal provisions regarding the St. Lawrence and Lake Michigan. But that treaty was later abrogated, as was said above, and was succeeded by the Treaty of Washington of May 8, 1871, in which no admission of "right" was made; instead, a "privilege" of navigation was mutually granted in perpetuity.

(2) *Other Problems on the Boundary Waters*

(a) Rules of Navigation

In 1864 the Congress of the United States enacted certain rules and regulations⁷⁰ covering the navigation of steamers on the Great Lakes. These rules were in force till 1895. On February 8th of that year the Congress passed "An act to regulate navigation on the Great Lakes and other connecting and tributary waters." A copy of this act was communicated by the American Secretary of State⁷¹ to the British Ambassador at Washington⁷² on the 21st of February of the same year, in the hope that the Canadian Government would also enact similar legislation for Canadian vessels in the boundary waters.⁷³ The matter hung fire until 1896, pending the settlement of the general question of regulations for the prevention of collision at sea.⁷⁴ On June 4, 1896, the British ambassador replied that "Lord Salisbury observed that the main difference between the rules desired by Canada and those desired by the United States had

⁶⁹ *Gallatin's Writings*, vol. ii, p. 403; cf. Schuyler, *op. cit.*, p. 280.

⁷⁰ 13 Stat. 58; R. S. section 4233, April 29, 1864.

⁷¹ Mr. Gresham.

⁷² Sir Julian Pauncefote.

⁷³ *U. S. For. Rel.*, 1895, part i, pp. 714-718.

⁷⁴ *Ibid.*

reference to the question of sound signals for use in fog", and that "the board of trade was unable to form a definite opinion as to the merits of the conflicting proposals of Canada and the United States".⁷⁵ These difficulties seem to have been overcome within the succeeding few years, because in 1899, in its opinion in the case of the "New York"⁷⁶ the Supreme Court of the United States held that "we are saved, however, consideration of these questions [as to the respective duties of vessels navigating the Great Lakes] by the fact that the signals and the steering rules of the United States and Canada are practically identical. This fact being once established, the duty of vessels of both nations in meeting each other, either upon American or Canadian waters is easily understood."

(b) The Right of Fishing

In 1889 the Secretary of State for the United States, Mr. Bayard, pointed out in one of his letters that "an American fisherman is not entitled to damages for the seizure of his nets by Canadian authorities when part of the net was in British waters".⁷⁷ In 1894 Mr. Uhl, the acting Secretary of State, wrote⁷⁸ that the right of fishing in the waters of the lakes and connecting waterways depended "merely upon the local law, and this Government cannot complain against the action of Canada in excluding our citizens from unlicensed fishing on the Canadian side of the conventional boundary, even though at a greater distance than three miles from shore. . . ." ⁷⁹ This right consequently could not "by any parity or stretch of reasoning be deemed a part of

⁷⁵ *U. S. For. Rel.*, 1896, pp. 365-366; see also Moore, *op. cit.*, vol. i, p. 684.

⁷⁶ 175 U. S. 187, 199.

⁷⁷ Moore, *op. cit.*, vol. i, p. 675.

⁷⁸ *Ibid.*

⁷⁹ Moore, *op. cit.*, vol. i, p. 674.

the stipulated rights of navigation and transit".⁸⁰ Mr. Uhl assumed that the Canadian authorities would, in necessary cases, act in conformity with the Dominion law, which proscribed "unlicensed fishing on the Canadian side of the boundary line running through the Great Lakes as fixed by existing treaty",⁸¹ of 1783. This position, in other words, meant, as Mr. Uhl himself added, that the right of fishing in the boundary and related waters was one of national rather than international jurisdiction; because the waters on either side stretching up to the boundary line itself, as the Canadian judge, McDougall, held in the case of the American vessel *Grace*, are "under the exclusive municipal jurisdiction of the respective countries".⁸²

In 1895 Mr. Uhl again asserted this view in a letter to Mr. Payne in connection with the boundary in the channel of the St. Lawrence River. He pointed out that on the British side of the boundary line "the Canadians have a right to enforce such fish and game laws as may be enacted in the Dominion. The circumstance that no corresponding fish and game laws are enforced on the American side of the boundary does not affect the Canadian rights in the premises."⁸³ This opinion was later affirmed by Mr. Gresham, Secretary of State, in a letter to Mr. Payne.⁸⁴

In 1908 the United States and Great Britain "equally recognizing the desirability of uniform and effective measures for the protection, preservation, and propagation of the food fishes in the waters contiguous to the United States and

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, Treaty of 1783; see in general in this connection: 197 M. S. Dom. Let. 118, May 23, 1894; 200 M. S. Dom. Let. 121, and other notes cited *ibid.*, p. 675.

⁸² Moore, *op. cit.*, vol. i, p. 675; Hyde, *op. cit.*, vol. i, sec. 186, p. 321.

⁸³ Moore, *op. cit.*, vol. i, p. 675.

⁸⁴ *Ibid.*

the Dominion of Canada",⁸⁵ concluded a treaty and provided for an "International Fisheries Commission" composed of one delegate for each country, to prepare the necessary regulations to be applied to the boundary and connected waters. This treaty was ratified on June 4, 1908.⁸⁶

(c) Wrecking Privileges

In 1878 the Congress of the United States passed "An Act to aid vessels wrecked or disabled in the waters continuous to the United States and the Dominion of Canada", and Mr. F. W. Seward, the Acting Secretary of State, transmitted a copy of the Act to Sir Edward Thornton, the British ambassador at Washington. In submitting the copy, the Acting Secretary reminded His Excellency that it could not take effect until the President of the United States had issued a proclamation declaring that American vessels in Canadian waters would receive reciprocal privileges. Sir Edward made no formal reply to the proposals, but unofficially intimated that although the Canadian Government had made no reciprocal legislation, the subject would receive consideration. The matter seems to have rested here until 1886, when Mr. Bayard, Secretary of State of the United States, in a communication to Mr. West, the British Minister, pointed out that the President was "desirous that the subject may be resubmitted to the consideration of Her Majesty's Government with the hope that some understanding may be arrived at for the mutual benefit of the important interests concerned".⁸⁷ In 1888 President Cleveland in his

⁸⁵ *U. S. For. Rel.*, 1908, pp. 379-382; *Br. and For. State Papers*, vol. 101, p. 224; Malloy, *op. cit.*, vol. i, p. 826; Ogilvie, *op. cit.*, p. 270. The second treaty was concluded April 11, 1908.

⁸⁶ *Ibid.* For a detailed reference to the International Fisheries Commission, see Jessup, Philip C., *L'Exploitation des Richesses de la Mer* (Paris, 1929), p. 38 *et seq.*

⁸⁷ Moore, *op. cit.*, vol. i, p. 685, citing MS. Notes to Great Britain XX, 196, Feb. 26, 1886.

annual message stated: "It is much to be desired that some agreement should be reached with Her Majesty's Government by which the damages to life and property on the Great Lakes may be alleviated by removing or humanely regulating the obstacles to reciprocal assistance to wrecked or stranded vessels. . . . The act of June 19, 1878, which offers to Canadian vessels free access to our inland waters in aid of wrecked or disabled vessels, has not yet become effective through concurrent action by Canada." ⁸⁸

In 1890 by an act of Congress ⁸⁹ it was provided that Canadian wreckers might render aid to "Canadian or other vessels and property, wrecked, disabled or in distress" in the American waters contiguous to Canada, in case the President of the United States would proclaim that reciprocal privileges were assured to the citizens of the United States. This act of Congress was to be construed as applicable to "the Welland Canal, the canal and improvement of the waters between Lake Erie and Lake Huron, and to the waters of the St. Mary's River and Canal". ⁹⁰

Two years later, on May 10, 1892, Canada passed a reciprocal Act, but the part of that act that read, "waters of Canada contiguous to the United States", was not to apply to the canals and other waters mentioned in the American act. ⁹¹ Some discussion followed on the question of whether or not the phrase "contiguous waters" included the canals and other connecting waters. ⁹² In 1893 by the legislative, executive, and judicial appropriation act of the United States, ⁹³ the prior act of 1890 was amended by the omis-

⁸⁸ President Cleveland, Annual Message, Dec. 3, 1888; *U. S. For. Rel.*, 1888, part i, p. xii.

⁸⁹ 26 Stat. 120.

⁹⁰ *Ibid.*

⁹¹ *U. S. For. Rel.*, 1892, pp. 277, 289, 292, 304-309.

⁹² *Ibid.*, pp. 331-339.

⁹³ March 3, 1893, 2 Supplement, Revised Statutes, chap. 211.

sion of the term "the Welland Canal."⁹⁴ Consequently Canadian vessels and wrecking appliances could "render aid and assistance to Canadian and other vessels and property wrecked, disabled or in distress, in the waters of the United States contiguous to the Dominion of Canada, including the canal and improvements of the waters between Lake Erie and Lake Huron and the waters of the Saint Mary's River and canal".⁹⁵ This amended act was proclaimed by President Cleveland, who was "satisfied that the privilege of aiding American or other vessels and property wrecked, disabled, or in distress, in Canadian waters contiguous to the United States has been extended by the Government of the Dominion of Canada to American vessels and wrecking appliances of all descriptions".⁹⁶ The proclamation was issued on the 7th of July, 1893.⁹⁷

(d) Further Settlement of the Boundary

For one hundred and twenty-five years after the Treaty of Paris⁹⁸ attempted the demarcation of the boundary, that problem remained unsettled. In 1908 a special commission was appointed by treaty to provide for the "more complete definition and demarcation of the international boundary between the United States and the Dominion of Canada".⁹⁹ The last section of the first article definitely declared that the line to be defined by the commissioners was "to be

⁹⁴ *U. S. For. Rel.*, 1893, p. 336.

⁹⁵ Moore, *op. cit.*, vol. i, p. 688; also see Act of Parliament, 55-56 Vic., chap. 4.

⁹⁶ Richardson, *Messages and Papers of the Presidents* (Washington, 1896-1899), vol. ix, p. 396.

⁹⁷ *U. S. For. Rel.*, 1893, p. 344; also see Canadian Sessional Papers, no. 52, 1893.

⁹⁸ 1783; see p. 52 *et seq.*

⁹⁹ Preamble, Treaty Concerning the Canadian International Boundary, ratified June 4, 1908; Malloy, *op. cit.*, vol. i, p. 815.

taken and deemed to be the international boundary from the Bay of Fundy to the mouth of the St. Croix River, as established by treaty provisions and the proceedings thereunder".¹⁰⁰ Thus provision was made for the settlement of this section of the boundary.

In this way, by means of gradual but constructive and co-operative efforts through treaties and reciprocal legislation, both Great Britain and the United States settled amicably and happily many of the problems that pertained to the waters through which their common boundary runs. These adjustments clearly indicate that from the inception of an independent American nation on this continent, the two nations had recognized the tremendous economic, domestic and even political importance of the boundary. But none of the adjustments they made provided for the installation of a permanent machinery of a joint or international character endowed with suitable power and adequate initiative which could be easily and freely used for the purpose of settling by amicable means all the disputes that arose or might arise on these common waters. Not until the negotiation of the treaty of January 11, 1909, was such a machinery provided for. Prior to that date each Government in its individual sovereign capacity launched the necessary diplomatic manoeuvres as the nature of the particular exigency demanded, and thus attempted the solution of all urgent questions. Sometimes special commissions or arbitral boards had to be created for such purposes; these agencies held most of their sessions in the British Capital—approximately 5000 miles away from the locus of all the controversies—or in Washington. On such occasions "they were always attended with a large retinue of subordinate officials, costing both Governments many hundreds of thousands of dol-

¹⁰⁰ *Br. and For. State Papers*, vol. 101, p. 224; Malloy, *op. cit.*, vol. i, p. 817.

lars".¹⁰¹ And yet solutions were not easily obtained; sometimes they were never obtained, as in the controversy that arose in connection with the Lake of the Woods,¹⁰² which persisted for over twenty-five years. So also the dispute in connection with the St. Mary's River, which lasted about twelve years.¹⁰³

Consequently the statesmen of the two countries realized, if only late, that international legislation was needed to define their rights on the common frontier. They also awoke to the need for a permanent machinery, responsive to the needs and wishes of the two nations, which should be charged with the determination of differences and the equitable administration of the boundary waters. Such legislation and machinery were provided by the treaty of January 11, 1909.

¹⁰¹ Speech of Senator Jones of Washington, U. S. Senate, February 26, 1915; U. S. Cong. Rec., vol. 52, 63rd Cong., 3rd Sess., pp. 4722-4725; also see Remarks of Representative Stevens of Minnesota, Congressional Record, vol. 49, 62nd Cong., 3rd Sess., p. 3121.

¹⁰² *Ibid.*, also see *Papers of the I. J. C.*, pp. 20-22.

¹⁰³ *Ibid.*

CHAPTER II

THE CREATION OF THE COMMISSION

IN 1894 the United States convened an Irrigation Congress at Denver, Colorado,¹ in which representatives of Canada and Mexico participated. At this congress the idea seems to have first taken root that some international organization, possessing suitable powers over streams of an international character on the North American continent, should be created. But no action followed until the next year. In September, 1895, the United States called the fourth annual session of the International Irrigation Congress², which assembled in the valley of the Rio Grande River at Albuquerque, New Mexico. This congress was "composed of delegates representing States and Territories west of the Mississippi, and also the States of Illinois, Wisconsin, New Jersey and Minnesota, and including representatives of the Governments of Canada and of Mexico".³ During the deliberations the whole question of the international waters came up for discussion "as a result of the dispute between the United States and Mexico regarding the division of the waters of the Rio Grande".⁴ The occasion therefore appeared opportune to the Canadian delegate, Col. J. S. Dennis,

¹ *Papers of the I. J. C.*, p. 43, also see pp. 101-121; address by Mr. Burpee at the Victorian Club, Boston, Feb. 17, 1919, *ibid.*, pp. 27-42; reprint from *Round Table*, Sept., 1915, *ibid.*, pp. 43-47.

² Also called the National Irrigation Congress.

³ Senate Document no. 253, 54th Congress, 1st session, May 11, 1896; Senator Warren presented to the Senate an address on the Irrigation Congress.

⁴ *Supplemental Argument, St. Mary and Milk Rivers* (Washington, 1917), p. 113, testimony of J. S. Dennis.

as well as to his Mexican colleagues in the congress⁵, to persuade the session to adopt a motion inviting the cooperation of the governments of the various countries for a consideration of the innumerable problems affecting international waters, chiefly in their relation to irrigation.⁶ They succeeded, and a resolution was passed by the congress asking the United States for the "appointment of an international commission to act in conjunction with the authorities of Mexico and Canada in adjudicating the conflicting rights which have arisen, or may hereafter arise, on streams of an international character".⁷

SUBSEQUENT ACTION

(1) by Canada

On December 13, 1895, the Canadian Minister of the Interior reported the above resolution to the Dominion Privy Council with a recommendation that the Governor-General request the British ambassador in Washington

to inform the Government of the United States that this Government will be glad to cooperate, by the appointment of an international commission or otherwise, as may be agreed upon, with the authorities of Mexico and the United States, with the object of regulating the use for purposes of irrigation of the waters of streams which have their origin in one of the countries named and subsequently flow through the territory of another.⁸

Until January 8, 1896, no action was taken on this recommendation; on that date, however, the Dominion Government took action and issued an Order-in-Council⁹, and the

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Senate Document, no. 253, p. 3; also see *Hearings, St. M. and M. Rivers*, p. 56.

⁸ *Ibid.*

⁹ Order in Council, P. C. 3645.

Committee of the Dominion Privy Council advised the Governor-General to instruct the British Ambassador in Washington regarding the wishes of the Canadian government.¹⁰ On the sixteenth of January, 1896, the Governor-General instructed the ambassador, and on March twenty-seventh of the same year Sir Julian Pauncefote, who was then the British ambassador to the United States, replied that the American Secretary of State, Mr. Olney, "does not lack interest in this important subject, yet from the information in the department's possession he can only regret his inability, agreeably to your courteous request, to give expression to the views of his Government upon the subject at the present time".¹¹ The matter rested here until 1902.

It may be of some interest here to observe that in the resolution adopted by the Irrigation Congress at Albuquerque, as well as in the recommendation of the Canadian Minister of the Interior, the name of Mexico as a possible partner in the creation of an international commission had been specifically mentioned. But in the reply which Sir Julian Pauncefote forwarded to the Governor-General, Mexico did not appear. So far as the negotiations are concerned, no reason is detectable for this omission. Sir Julian mentions in his dispatch "waters of streams rising in either of the two countries and flowing through the other", referring thereby only to the United States and the Dominion.¹² At any rate Mexico no longer figures in the historic evolution of the International Joint Commission.¹³

¹⁰ *Hearings, St. M. and M. Rivers*, p. 57.

¹¹ *Ibid.*

¹² Referred to in *Hearings, St. M. and M. Rivers*, p. 56, 57.

¹³ Between the United States and Mexico there was already in existence the International Boundary Commission on the Rio Grande, established according to Article I of the treaty of 1889 (see Introduction, *supra*). The purpose then of the resolution of the Albuquerque Irrigation Congress as well as the Privy Council report of 1896, seems to have

(2) by the United States

From Sir Julian's reply to the Governor-General of Canada it is evident that until March, 1896, the Government of the United States had done little in the matter. On May 11, 1896, however, Senator Warren presented to the Senate an "address to the people of the United States by the National Irrigation Congress . . .".¹⁴ This address embodied several resolutions, one of which was the Albuquerque resolution calling for the creation of an international commission. The address was ordered to be printed, but no thing further seems to have transpired until 1902.¹⁵

On June 13, 1902, the United States passed a Rivers and Harbors Act¹⁶, section IV of which embodies a provision whereby the President of the United States was requested by the Congress to invite the Government of Great Britain to

join in the formation of an international commission, to be composed of three members from the United States and three who shall represent the interests of the Dominion of Canada, whose duty it shall be to investigate and report upon the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada, including all of the waters of the lakes and rivers whose natural outlet is by the River St. Lawrence to the Atlantic ocean; also upon the maintenance and regulation of suitable levels, and also upon the effect upon the shores of these waters and the structures thereon, and upon the interests of navigation by reason of the diversion of these waters from or change in their natural flow; and further, to report upon the

been to coordinate in some form or other all the international waters on the North American continent under one system of administration.

¹⁴ Also called the International Irrigation Congress; see p. xiv of official proceedings of the 21st International Irrigation Congress, held at Calgary, Alberta, in 1915.

¹⁵ Sen. Doc. no. 253, p. 3.

¹⁶ 32 Stat. 372; 37 Stat. 826.

necessary measures to regulate such diversion, and to make such recommendations for improvements and regulations as shall best subserve the interests of navigation in said waters.¹⁷

The note of invitation was dispatched to the London Foreign Office dated July 15, 1902. The American Commissioners were appointed three months later, on October 2, 1902.¹⁸ The representatives of Canada were not notified until January 3, 1905. During that year, however, the Governor of Canada took the necessary action and in consequence the International Waterways Commission was created.¹⁹ Its specific duty was evident in the terms of reference under which it was established. It was not clothed with any determining authority, nor did it possess any administrative, executive or legislative powers over these waters. It was essentially an investigative body advised to report to the two governments its observations and, if necessary, recommendations.²⁰

Nevertheless the Waterways Commission rendered valuable services. Its reports covered several important subjects.²¹ It reported, for example, on the diversion and division of the waters of the Niagara River. In its "Report upon Conditions Existing at Sault Ste. Marie" on May 3, 1906, the Commission made certain recommendations, of

¹⁷ See also *Papers of the I. J. C.*, pp. 8-9.

¹⁸ See *supra*, note 13, on p. 73, Rivers and Harbors Act, June 13, 1902, sec. iv.

¹⁹ See J. Castell Hopkins, F.S.S., *Canadian Annual Review of Public Affairs* (Toronto, 1905), pp. 535-536. Members of the Waterways Commission: for the United States: Col. O. H. Ernst, U. S. Army, Corps of Engineers, George Clinton of Buffalo, N. Y., G. S. Williams of Ithaca, N. Y.; for Canada: W. F. King, Chief Astronomer, Dominion Gov't., J. P. Mabee, succeeded by George C. Gibbons, Louis Coste of Ottawa.

²⁰ International Waterways Commission, *Progress Reports*, 1905 (Ottawa), pp. 3-7.

²¹ International Waterways Commission, *Progress Reports*, 1905-1911.

which No. 5, after referring to the dangers threatening the boundary waters and lakes in general from imprudent and indiscriminate diversions or obstructions by the riparians, suggested "that a joint commission be created to supervise their enforcement", i. e. the rules and regulations adopted by the Waterways Commission. This is the first direct reference to the future International Joint Commission.²²

On January 4, 1907, the Commission recommended again, in its "Report on the Location of the Boundary Line between the United States and Canada through Lake Erie".²³, "that the location, delineation on modern charts, and monumenting of the boundary line proceed under the direction of this Commission or *another international Commission to be appointed . . .*".²⁴

As a result of their investigations, it was clear to the commissioners that certain principles ought to be pre-determined which might be relied upon for the solution of the different questions that were likely to arise on these waters. They themselves could perhaps set up these principles, but not enforce them, for under the terms of their reference they were not deemed competent to shoulder that duty. They therefore recommended in their Second Report, as above mentioned, that "a joint commission be created", "or that such powers [of enforcement] be vested in the existing International Waterways Commission . . .".²⁵ They further recommended, in their report of the same year on the application of the Minnesota Canal and Power Company²⁶ that:

²² *Ibid.*, *Second Report*, 1906, vol. i, pp. 14-15.

²³ The duty of delimiting the boundary under the Treaty of Ghent had finally devolved on this commission. It also reported on the Chicago Drainage Canal and its effect on the levels of the Great Lakes.

²⁴ *Ibid.*, *Third Report*, 1906, vol. ii, p. 234. Italics inserted.

²⁵ *Ibid.*, *Second Report*, vol. ii, pp. 104, 112.

²⁶ *Ibid.*, *Second Report*, vol. ii, p. 131.

2. As questions involving the same principles and difficulties, liable to create friction, hostile feelings, and reprisals, are liable to arise between the two countries, affecting waters on or crossing the boundary line, the Commission would recommend that a treaty be entered into which will settle the rules and principles upon which all such questions may be peacefully and satisfactorily determined, as they arise.

3. The Commission would recommend that any treaty which may be entered into should define the uses to which international waters may be put by either country without the necessity of adjustment in each instance, and would respectfully suggest that such uses should be declared to be:

- (a) Use for necessary domestic and sanitary purposes.
- (b) Service of locks used for navigation purposes.
- (c) The right to navigate.²⁷

4. The Commission would also respectfully suggest that the treaty should prohibit the permanent diversion of navigable streams, which cross the international boundary or which form a part thereof, except upon adjustment of the rights of all parties by a *permanent commission*,^{27a} and with its consent.

These reports and recommendations of the commission reached the two governments at a time which may be called the "psychological moment". The Lake of the Woods dispute had been pending since 1888; the controversy regarding the use of the waters of the St. Marys and Milk Rivers for irrigation purposes on either side of the boundary had been going on for a considerable time. All these needed solutions. Consequently the two governments began negotiations, during the years of 1907 and 1908. The two chief statesmen who figured prominently in these transactions were the Honorable Elihu Root, then Secretary of State for the United States, and the late Lord Bryce, then British Ambassador to

²⁷ Cf. *Third Progress Report*, vol. ii, p. 146; also Article viii of the Treaty of 1909.

^{27a} Italics inserted.

the United States.²⁸ Mr. Root was assisted by Mr. Chandler P. Anderson of the United States Department of State and Mr. F. H. Newell²⁹ of the United States Reclamation Service, while Mr. Bryce had the cooperation of the late Hon. William Pugsley, then Minister of Public Works in Canada and subsequently the Governor of the Province of New Brunswick, the late Doctor W. F. King of the International Boundary Commission, and the late Sir George Gibbons of the International Waterways Commission.³⁰ The result of the labors of these distinguished men was the conclusion of the Boundary Water Treaty of January 11, 1909, often called "the Root-Bryce Treaty".

Three months after the signing of the treaty, on March 3, 1909, the Senate of the United States advised and consented to its ratification by the President. On May 5, 1910, the exchange of ratifications took place, and on the thirteenth day of the same month and year President Taft promulgated the treaty.³¹ On June twenty-ninth the British Under Secretary of State for the Colonies, referring to the achievements of Mr. Bryce, said in the House of Commons that "Sir Wilfred Laurier and the Canadian Government have borne testimony to the great services rendered . . . by Mr. Bryce", and that therefore he thought "it was right . . . that formal acknowledgement should be made of the very exceptional services . . . rendered by Mr. Bryce".³²

²⁸ See *British Parliamentary Debates*, vol. 18 (1910), p. 957; also Root, memorandum in *Hearings, St. M. and M. Rivers*, pp. 65-67.

²⁹ *Hearings, St. M. and M. Rivers*, pp. 10, 77.

³⁰ *Papers of the I. J. C.*, p. 28.

³¹ Malloy, *op. cit.*, vol. iii, pp. 2607-2616; 36 Stat. 2448.

³² *British Parliamentary Debates*, vol. 18 (1910), p. 957.

THE INTERNATIONAL JOINT COMMISSION

Article VII of the above treaty provides that "The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada composed of six commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor-in-Council of the Dominion of Canada."³³

To fulfill the American share of the obligations arising from this Article, the Secretary of State, Mr. Knox, recommended to the President on May 23, 1910,

that the Congress be asked to enact legislation. . . . The legislation should provide the manner of appointment of three United States Commissioners . . . ; for their compensation and for their travelling and other expenses necessarily incurred in connection with and in the course of their official duties; for the appointment of a secretary; for the employment of such clerical and other assistants as may be found necessary and deemed advisable; and for office accommodations, equipment, and supplies, as well as for one half-share of the reasonable and necessary joint expenses. For these purposes it is thought that the sum of \$75,000 will not be excessive.³⁴

The Secretary also reminded the President that under Article XII of the treaty the High Contracting Parties had agreed to adopt such appropriate legislation as would give the Commission "the powers to administer oaths to witnesses and to take evidence on oaths whenever deemed necessary in any proceeding, or inquiry or matter within its jurisdiction under the treaty; and also to provide for the issue of sub-

³³ Malloy, *op. cit.*, pp. 2607-2616.

³⁴ Senate Document no. 561, 61st Congress, 2nd Session; also see House of Representatives Document no. 1170, 61st Congress, 3rd Session.

poenas and for compelling the attendance of witnesses in proceedings before the Commission . . .".³⁵

Consequently the Sundry and Civil Appropriation Act for the fiscal year 1911 contained a provision whereby a sum of \$75,000 was appropriated by Congress for "paying salaries and expenses" and the various other items mentioned in the letter.³⁶ This amount was to be "expended under the direction of the Secretary of State".³⁷ On March fourth of the same year Congress enacted legislation whereby the American members of the Commission were given power to administer oaths or carry out any necessary proceeding referred to in the letter of the secretary. For purposes of compelling attendance and production of books or other documents, the Commission could apply to the Circuit Court of the United States for the circuit within which the Commission might be holding its session; such a court was "empowered and directed to make all orders and issue all processes necessary and appropriate for that purpose".³⁸ On March 9, 1911, the members of the Commission on the part of the United States were appointed, and the Chairman for the American Section was notified on December 6, 1911.³⁹ The salary of the American Commissioner is seven thousand five hundred dollars per annum, while the Secretary gets four thousand dollars.⁴⁰

As far as Canada was concerned, matters did not move so rapidly. The Dominion Parliament, nevertheless, enacted

³⁵ *Ibid.*

³⁶ Public no. 266, 36 Stat. 384; also no. 480, 36 Stat. 240.

³⁷ *Ibid.*

³⁸ H. R. 32909; Public No. 525, 36 Stat. 285.

³⁹ Cong. Rec., vol. 49, part 4, p. 3123, 62nd Cong., 3rd Sess.

⁴⁰ Senate Debate, remarks of Mr. Smith of Arizona, member of the Commission, *ibid.*, vol. 60, pp. 3377-3378, 66th Cong., 3rd Sess.; see H. R. 26235; also *ibid.*, vol. 45, p. 7453, 61st Cong., 2nd Sess.

legislation on May 19, 1911⁴¹, providing for the establishment and expenses of the Canadian side of the Commission. By section six of this enactment, "the Governor in Council may appropriate annually out of the consolidated revenue fund, a sum not exceeding seventy-five thousand dollars towards the payment of salaries of the Commissioners to be appointed . . .". "Each of said Commissioners . . . shall receive as compensation for his services an amount to be fixed by the Governor in Council, but not in any case to exceed the sum of seventy-five hundred dollars per annum. The Secretary appointed by the Canadian section . . . shall receive . . . a sum not exceeding three thousand dollars per annum."⁴² By section five of the same act, the "International Joint Commission, when appointed and constituted . . . shall have power, when holding joint sessions in Canada, to take evidence on oath, and to compel the attendance of witnesses by application to a judge of the superior court of the Province within which such session is held, and such judge is hereby authorized and directed to make all orders and issue all processes necessary and appropriate to that end".⁴³

Although the necessary legislation and appropriations had been obtained, the Canadian Commissioners were not appointed until the end of 1911. On August 11th of that year the Committee of the Canadian Privy Council, upon the recommendation of the Minister of Public Works, advised the Governor-General that three members, whose names it suggested, "be appointed by His Majesty commissioners on the part of the United Kingdom pursuant to section 7 of the treaty relating to boundary waters . . .".⁴⁴ Subsequent to

⁴¹ 1-2 Geo. V, chap. 28.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ P. C. 1850 *Canadian Sessional Papers*, No. 119, 2 George V, p. 2.

this action several telegrams passed between the Governor-General, the British Secretary of State for the colonies ⁴⁵, and the British ambassador ⁴⁶ at Washington regarding the nominations made by the Canadian ministry. Meanwhile the ministry under Sir Wilfred Laurier fell, and the succeeding one under Sir Robert Borden telegraphed the Colonial Secretary in London that the new cabinet "earnestly hope that no appointment will be made by His Majesty's Government of three commissioners on the part of the United Kingdom". ⁴⁷ On October 23, 1911, the Committee of the Privy Council recommended the names of three other Canadians for their section of the Commission, cancelling the three previous names endorsed by the Laurier administration. On November 18, 1911, the Colonial Secretary transmitted the King's Commissions to the Governor-General ⁴⁸ and on the 27th of the same month the Canadian Commissioners were officially notified. ⁴⁹

On February 2, 1912, the two sections of the Commission, in accordance with the provisions of Article XII of the treaty of 1909, met at Washington and adopted a certain procedure to guide the conduct of the Commission as well as of the parties who should appear before it.

Before concluding this chapter, a word may be added about the commissioners. The United States appointed the Hon. Thomas H. Carter of Montana, Hon. James A. Tawney of Minnesota and Mr. Frank S. Streeter of New Hampshire as the first three commissioners. But before the Commission had completed its organization in January, 1912, Senator

⁴⁵ Harcourt.

⁴⁶ Bryce.

⁴⁷ *Sessional Papers*, No. 119, p. 8, 2 George V, 1911; also see remarks of Rep. Fitzgerald, N. Y., Cong. Rec., vol. 49, part 4, p. 3119 (1913).

⁴⁸ H. R. H. the Duke of Connaught and Strathcona.

⁴⁹ *Canadian Sessional Papers*, No. 119, 2 Geo. V, p. 10.

Carter died, and in his place the Hon. George Turner of the State of Washington was appointed by the President. The latter appointee had been one of the Commissioners in the Alaskan Boundary dispute, and had also acted as counsel for the United States in the North Atlantic Fisheries Arbitration. Later on both Senator Turner and Mr. Streeter were succeeded by the Hon. Obadiah Gardner of Maine, and the former Governor Robert G. Glenn of North Carolina. When Mr. Tawney died, the Hon. Clarence D. Clark of Wyoming succeeded him. Meanwhile Governor Glenn died, and his place was filled by the Hon. Marcus A. Smith of Arizona. Subsequently Mr. Gardner resigned, to be succeeded by the Hon. Charles E. Townsend of Michigan. When Mr. Smith died, Senator Fred T. Dubois succeeded him, and Senator McCumber succeeded Mr. Townsend on the latter's death. All except Commissioner Tawney, who had served only in the House of Representatives where he had been chairman of the Committee on Appropriations, and Commissioner Streeter and Commissioner Glenn, had been members of the United States Senate. Of the first eleven men appointed at various times to fill up the American section of the Commission, five died and three resigned. The present members (1931) are: Messrs. John H. Bartlet (chairman), P. J. McCumber, and A. O. Stanley.

The first three Commissioners who were nominated on the Canadian side by the Laurier administration were Sir George Gibbons of Ontario, Alexander P. Barnhill of New Brunswick, and Aimé Géoffrion of Montreal.⁵⁰ But due to the fall of the Laurier ministry, as elsewhere noted, these nominations were subsequently disregarded, and their places were taken by the Hon. Chase Casgrain, K. C., Mr. Charles A. Magrath, Topographical Surveyor for the Dominion, and

⁵⁰ *Canadian Sessional Papers*, No. 119, 2 George V, 1911; Telegrams, pp. 2-15.

Mr. Henry A. Powell, K. C.⁵¹ Mr. Casgrain resigned in 1914 to become the Postmaster General in the Canadian Cabinet; he was succeeded by Mr. Paul B. Mignault, K. C., who resigned in 1918 to be appointed member of the Supreme Court of the Dominion. Sir William Hearst succeeded Mr. Mignault. Sir William was a former Premier of the Province of Ontario. Mr. Powell, the last of the first three, resigned in 1928, and was succeeded by Mr. George W. Kyte, K. C., who was formerly the Chief Whip of the Canadian Liberal Party in the Dominion Commons. The present members therefore are Mr. Magrath (chairman), Sir William Hearst, and Mr. Kyte.

That men of such distinction and experience composed the personnel of the International Joint Commission should indeed be a matter of great satisfaction to the two nations responsible for its creation.

In the next few chapters an investigation is made as to the methods through which the Commission carries out the duties with which it is charged and towards that end the powers of the Commission under the treaty of 1909 are dealt with separately. A word, however, may be added here for the purpose of introducing the discussion of the several powers the Commission has under the treaty of 1909. The Commission exercises under Article III, IV and VIII of the treaty a compulsory jurisdiction over boundary waters. The result is that without the approval of the Commission, no use, obstruction or diversion of these waters can be effected. Except where the Governments conclude a "special agreement", as referred to in Articles II, III, IV and XIII, on any specific use of these waters, the Commission has the right of approval or disapproval of all applications which the two governments may forward to it from time to time. Along with this compulsory jurisdiction

⁵¹ *Ibid.*

the Commission has also a certain degree of voluntary jurisdiction under Article X, whereunder, upon the joint reference by the two governments of any question or matter of difference, the Commission has the power to pronounce a decision as an arbitral court. Thus the entire judicial power, both compulsory and voluntary, is covered by Articles III, IV, VIII and X of the treaty.

Under Article IX the two governments may call upon the services of the Commission as an investigative body. On such occasions the Commission may conduct necessary examinations, prepare a report embodying its conclusions and recommendations, and submit it to the two governments. Of course such a report is not legally binding on the two governments, for it is not a decision as in the above instances. Nevertheless the services of the Commission as a fact-finding body would appear to be highly advantageous in the formulation of policies between the two governments, while they help to soothe national feelings arising from any unfortunate question or matter of difference.

Finally, under Article VI the Commission performs a specific administrative function in relation to two rivers, the St. Mary and the Milk, the waters of which have caused considerable friction in the past because of their need for irrigation purposes on both sides of the boundary. Thus under the treaty of 1909 the Commission has judicial, administrative and investigative powers, each of which is separately treated in the following chapters.

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CHAPTER III

THE JUDICIAL POWERS

THERE are four Articles in the Treaty of January 11, 1909, that describe the judicial powers of the Commission. They are Articles III, IV, VIII and X. Of these the first three provide for the *compulsory jurisdiction* of the Commission, the last for its *voluntary jurisdiction*. For clarity and convenience these two aspects are treated separately.

Compulsory Jurisdiction: This sphere of the Commission's judicial functions may be subdivided into three specific powers which consist of: (1) power to approve use, obstruction or diversion of the boundary waters, either by the two Governments or by private persons; (2) power to approve the above uses in waters flowing from and across the boundary; and (3) power to require suitable and adequate provisions against injury of any interests on either side of the boundary.

(1) POWER TO APPROVE "USES" IN BOUNDARY WATERS

By the provisions of Article III, the High Contracting Parties have declared that "in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses . . . of boundary waters . . . shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions, and with the approval of . . . the International Joint Commission".¹

¹ Art. iii, 1st paragraph.

The term "boundary waters" is defined for the purposes of the Treaty by the Preliminary Article. There it is declared that "boundary waters are . . . waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms and inlets thereof. . . ." ² In these waters the two Governments have agreed that they will not authorize any use, obstruction or diversion without the approval of the Commission. Fifteen cases affecting the boundary waters have been presented to the Commission for its approval under Article III: four on the St. Croix River (one was withdrawn), ³ three on the St. Lawrence River, ⁴ three on the Rainy River, ⁵ two on the St. Mary's River at Sault Ste. Marie, ⁶ one on the St. Clair River, ⁷ one on the Niagara River, ⁸ and one on the Lake of the Woods. ⁹

The case that concerned the Lake of the Woods involved certain important features relating to the question of the Commission's jurisdiction on boundary waters. On September 8, 1913, the Greater Winnipeg Water District, a Canadian municipal corporation, ¹⁰ applied to the Commis-

² Preliminary Article, for a more detailed account, see *supra*, chap. i.

³ (1) St. Croix Water Power Co.; (2) Sprague's Falls Mfg. Co., Ltd.; (3) St. Croix River Fishways (Canadian Cottons withdrawn).

⁴ New York & Ontario Power Co.; St. Lawrence River Power Co. (twice).

⁵ Rainy River Improvement Co.; International Lumber Co.; Watrous Island Boom Co.

⁶ Michigan Northern Power Co.; Algoma Steel Corporation, Ltd.

⁷ St. Clair Channel Case.

⁸ Buffalo and Fort Erie Public Bridge Co.

⁹ Greater Winnipeg Water District Case.

¹⁰ 3 Geo. V, ch. 22, 1913, Statutes of Province of Manitoba; *Hearings, Greater Winnipeg Water District* (Washington, 1914), p. 7.

sion, after obtaining an Order in Council of the Canadian Government, for the approval of the use of the waters of Shoal Lake, "situate in the Province of Ontario and Manitoba", for "domestic and sanitary purposes".¹¹ Shoal Lake, although entirely a Canadian body of fresh water, is connected nevertheless by a series of passages and rapids¹² with the Lake of the Woods, which is a treaty water. The Canadian Order in Council had declared that "after full consideration the conclusion has been reached that *Shoal Lake is not a boundary water* within the definition thereof in the treaty"¹³ of 1909, "or otherwise".¹⁴ The Secretary of State for the external affairs of Canada had also pointed out that "Shoal Lake is not to be considered a boundary water, but that the interests of navigation and the level of boundary waters on both sides of the boundary may possibly be affected. . . . It thus appears desirable that the said application of the Greater Winnipeg Water District . . . should be considered and dealt with by the International Joint Commission."¹⁵ It was in consequence of these circumstances that the Commission had been approached by the applicant District.

During the hearings before the Commission, it was established that the Water District required approximately 85 to 100 million gallons of water *per diem*;¹⁶ that Shoal Lake alone could not supply that need; and that, therefore, at least "in some dry years" the applicant might need to draw a certain quantity from the waters of the Lake of the Woods.¹⁷

¹¹ *Ibid.*, p. 9.

¹² Opinion, *ibid.* (Washington, 1914), p. 3.

¹³ *Ibid.*, p. 5. Italics inserted.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Opinion, *Hearings, G. W. W. District*, pp. 9, 21.

¹⁷ *Hearings, ibid.*, p. 25; also see Opinion, *ibid.*, pp. 9-10.

Under these circumstances, the question to be decided by the Commission was whether it had jurisdiction in the matter, as the application did not contemplate a diversion from the Lake of the Woods.¹⁸ Commissioner Tawney (U. S.) therefore made the suggestion¹⁹ to the applicant's counsel, Judge Campbell, to amend the application "by adding, 'and Lake of the Woods'. Then the order can cover both, to remove all questions of jurisdiction and everything else, and protect Winnipeg hereafter."²⁰ Commissioner Turner (U. S.) said that he thought that the applicant "ought to put in, if you amend it, that Shoal Lake is an inlet of the Lake of the Woods, if you want to get the jurisdiction of the Commission".²¹ The applicant, however, amended the application as Commissioner Tawney had suggested, and thus brought it within the jurisdiction of the Commission.

The Commission, after due consideration, gave an order of approval to the Water District to divert the necessary water. In the Opinion on the case the Commission held that "Shoal Lake is a tributary of the Lake of the Woods".²² "If the water had come from Shoal Lake only," said Commissioner Casgrain, who wrote the opinion, "I would have had some hesitation in concluding that the Commission had jurisdiction."²³ Being of the opinion that Shoal Lake was neither an arm nor an inlet nor a bay of the Lake of the Woods, but at most a tributary thereof, he would have been inclined to hold that the matter of the supply of the Greater Winnipeg Water District was "one of municipal concern", had it not been for the fact that "this uncontradicted testi-

¹⁸ *Ibid.*, p. 3, Order, *ibid.*, p. 14, par. 4 of application.

¹⁹ *Hearings, ibid.*, p. 5, Order of Approval, p. 16.

²⁰ *Hearings, ibid.*, p. 5.

²¹ *Ibid.*

²² Opinion, *ibid.*, p. 3.

²³ *Ibid.*, p. 10.

mony showed conclusively that in order to get the supply the applicant would have to draw, through Shoal Lake, on the waters of the Lake of the Woods, which is a boundary water". "The diversion, however, although sufficient to give the Commission jurisdiction, is not, from the standpoint of navigation or of the other interests which depend upon the waters of the Lake of the Woods, of any great moment."²⁴

From this case it would appear that when diversions from national waters would be indirect diversions of the boundary waters, the Commission would have jurisdiction.

In the St. Lawrence River Power Company case which concerned the construction of a submerged weir in the South Sault or South Channel of the St. Lawrence River, the question arose whether or not the Commission had jurisdiction over the South Channel, since it had been specifically provided by the terms of the Webster-Ashburton Treaty of 1842, that the North and South Channels of the St. Lawrence River, should forever remain free and open to the subjects and citizens of the Contracting Parties.²⁵ The Commission held that the South Channel was a boundary water within the terms of the Waterways treaty,²⁶ and therefore that it had "jurisdiction with regard to any obstruction intended to be placed in this channel which is undoubtedly a boundary water . . ." ²⁷

(2) POWER TO APPROVE GOVERNMENTAL WORKS IN BOUNDARY WATERS

The High Contracting Parties have, however, reserved to themselves under Article III their existing rights to under-

²⁴ Opinion, *ibid.*, p. 10.

²⁵ Article vii, 1842; Malloy, *op. cit.*, vol. i, pp. 654-655.

²⁶ Preliminary Art., 1909.

²⁷ Interim Opinion, *St. Lawrence River Power Co.* (Ottawa, 1919), p. 19; see the arguments under Treaty Interpretation, *infra*, p. 201 *et seq.*

take and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and such other works as may be conducive to the benefit of commerce and navigation.²⁸ Such works, nevertheless, should be "wholly" on the side of the government undertaking them and they should not "materially affect the level or flow of the boundary waters on the other" side of the line, nor should they "interfere with the ordinary uses of such waters for domestic and sanitary purposes".²⁹ These provisions seem to imply that whenever either of the Contracting Parties intends to undertake a project in the boundary waters with a view to improve navigation, that party would be bound to seek the approval of the Commission.

The Government of the United States has set an example in this connection. On December 29, 1916, the Government filed an application "for approval of the dredging of a channel in the St. Clair River on the United States side of the boundary line, 400 feet in width, 21 feet in depth, and about 6000 feet in length, and for the construction of a submerged weir, or some similar compensating work, about 3 feet in height, across the river from the American to the Canadian side".³⁰ The purpose of these works was two-fold: to improve navigation on the St. Clair by providing a channel on the American side deep and wide enough for downstream vessels, and to utilize the channel on the Canadian side for the exclusive use of upstream vessels. Heretofore the American channel had been shallow and inadequate for commercial purposes, leaving thereby the

²⁸ Art. iii, 2nd paragraph.

²⁹ *Ibid.*

³⁰ Appropriations, Department of State, 1923; Hearings before the Subcommittee of the House of Representatives, 1922, p. 334; *Papers of the I. J. C.*, p. 132, docket xiii.

channel on the Canadian side congested with heavy traffic. The Commission after due consideration granted the application, embodying in its order of approval certain conditions which appeared necessary to determine the effects of the various constructions on the levels of Lake Huron, and also to provide against other contingencies.³¹

(3) POWER TO APPROVE WORKS IN WATERS FLOWING
FROM OR ACROSS THE BOUNDARY

The above jurisdictional power of the Commission is further enhanced by the provisions of Article IV. It refers to the construction or maintenance on the respective sides of the boundary of "any remedial or protective works or any dams or other obstructions in waters *flowing from boundary waters* or in waters at a lower level than the boundary in rivers *flowing across* the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary". (Italics inserted.) Rivers, therefore, like the Winnipeg, the lower St. Lawrence and the lower St. John,³² which flow from the boundary waters,³² as well as rivers like the Richelieu, the Red, the Souris, the Columbia,³⁴ and certain others which *flow across* the boundary, are outside the province of the term "boundary waters".³⁵ But any construction in these waters, whether they flow from or

³¹ *Papers of the I. J. C.*, pp. 132-133.

³² The St. John "rises on the boundary between Maine and Quebec, and flows first northeast through north Maine, then eastward on the boundary between Maine and New Brunswick", and southward through New Brunswick to the Bay of Fundy; *The New International Encyclopedia*, p. 336; also see *Encyclopedia Americana*, vol. 24, p. 134; *Chambers Encyclopedia*, vol. ix, p. 24; *Order N. B. E. P. Com.*, p. 1.

³³ *Papers of the I. J. C.*, p. 29; also p. 108.

³⁴ *Ibid.*

³⁵ The St. Mary and Milk rivers, although transboundary in character, are specially provided for in Article VI.

flow across the boundary, should be approved by the Commission according to the terms of Article IV, whenever it is evident that such construction would "raise the natural level of waters on the other side of the boundary". The High Contracting Parties declare they will not authorize any such construction or maintenance of remedial or protective works "on their respective sides of the boundary" unless the same are approved by the International Joint Commission.³⁶

The following are the cases that have occurred in this connection. On March 25, 1925, the New Brunswick Electric Power Commission (Canada) filed an application with the International Joint Commission. Therein the applicant invoked the approval of the Commission for plans and specifications of works to be erected at Grand Falls for the purpose of developing hydro-electric power in and adjacent to the channel of the River St. John. Grand Falls, however, is situate on the St. John in New Brunswick,³⁷ "about three miles below the point at which the international boundary intersects the medial thread of the river". The *locus in quo* therefore was wholly *within* the Province of New Brunswick, and therefore *without* the province of what is described as "boundary waters" in the Preliminary Article.³⁸ The applicant nevertheless was obliged to resort to the Commission because it was evident that the project involved "the placing of an obstruction in waters *below* the international boundary *which will affect the level of waters above the boundary, and flowing across the boundary*".³⁹ The applicant therefore was of "opinion" that "the Com-

³⁶ Article iv.

³⁷ See *supra*.

³⁸ Preliminary Article, see *infra*, Appendix A; Order, *New Brunswick Electric Power Commission* (Washington, 1926), p. 1; also Order, *St. John River Power Company* (Washington, 1927), p. 1.

³⁹ Application, *N. B. E. P. Com.*, p. 11. Italics inserted.

mission may have jurisdiction in the premises" according to "the terms of Article IV of the Boundary Waters Treaty".⁴⁰ The Commission not only entertained jurisdiction, but also issued an order of approval of the applicant's prayer.⁴¹

A similar approval was given to the application of the St. John River Power Company, which subsequently succeeded in title to the rights and obligations of the New Brunswick Electric Power Commission as far as the latter's projects were concerned.⁴² Because of the obvious fact that the levels of boundary waters would be raised by the proposed works, the New Brunswick Power Commission had to seek the approval of the Joint Commission.

Another interesting case arose when on November 29, 1927, the Creston Reclamation Company, Limited, a Canadian corporation of British Columbia, applied to the Commission for approval of certain works adjacent to the channel of the Kootenay River, for the purpose of reclaiming certain lands near Creston, in British Columbia. The Kootenay rises in British Columbia, not far from the source of the Columbia River, heads southward, *across* the international boundary, into the State of Idaho, thence rather abruptly turning northerly into the Kootenay Lake in British Columbia, it falls into the Columbia River. The applicant in this case had submitted that the proposed works would affect the international waters at least in a "merely nominal way".⁴³ The Commission therefore exercised its jurisdiction and handed down a unanimous order of approval of the proposed works of the applicant company.

⁴⁰ *Ibid.*

⁴¹ Order of Approval, *N. B. E. P. Com.*

⁴² Order, *St. John R. P. Co.*, pp. 1-2.

⁴³ Application, Order, Opinion and *Hearings, Creston Reclamation Company, Ltd.* (Washington, 1928), p. 5.

*Principles to be observed by the Commission over
boundary waters under Article VIII*

As regards the uses, obstructions or diversions of the boundary waters as provided for in Articles III and IV, certain "rules or principles"⁴⁴ and a certain "order of precedence"⁴⁵ were established by the High Contracting Parties under the terms of Article VIII. Therein it is provided that the "International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required".⁴⁶ But "in passing upon such cases the Commission shall be governed by the following rules or principles":⁴⁷

The first Rule: "The High Contracting Parties shall have, each on its own side of the boundary, *equal and similar rights*⁴⁸ in the use of the waters hereinbefore defined as boundary waters".⁴⁹ This requirement for an equal division, however, "may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division cannot be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side".⁵⁰

This provision was first called into operation almost three years after the Commission had come into existence.

⁴⁴ Article viii.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Italics inserted.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

On January 29, 1915, the St. Croix Water Power Company applied to the Commission for the approval of a dam and power canal for the purpose of obstructing, diverting and using the waters of the St. Croix River at Grand Falls in the State of Maine and the Province of New Brunswick. On the same day a Canadian concern, Sprague's Falls Manufacturing Company, Limited, also made an application for the approval of the Commission of similar constructions and uses of the waters of the St. Croix River, also at Grand Falls. The two companies were not competing with each other. Although they were separate corporations, they were controlled "by the same interests and operated as a single company".⁵¹ The diversion was to be made under both the applications on the American side.⁵²

The Commission however killed two birds with one stone; it consolidated the subject matter of the two applications and heard them both as one.⁵³ Several important questions were brought into the testimony during the hearings regarding the "*requirement for an equal division*" as well as "temporary diversions", both phrases having been incorporated in Article VIII by the High Contracting Parties. These questions had to be dealt with, because the applicant companies had asked the diversion on the American side not of a moiety of the waters of the American side alone but of practically the whole of the waters of the St. Croix on the Canadian side as well, or at least such portion of that river which they might require; and there was no doubt but that the diversion would "at times rob the river for some distance below the dam of all of its

⁵¹ *Papers of the I. J. C.*, pp. 130-131.

⁵² Order of Approval, *St. Croix Water Power Co.* (Washington, 1915), p. 3; *Hearings, ibid.*, p. 132, Mr. Powell's remarks.

⁵³ Applications, *St. Croix W. P. Co., Sprague's Falls Mfg. Co., Ltd.*

waters".⁵⁴ This point was developed during the hearings. Counsel MacInnes for the Government of the Dominion of Canada explained during the examination of one of the applicant's witnesses, Mr. Hosford,⁵⁵ the President of the St. Croix Paper Co., that "the Canadian interests could obtain equal and similar rights in one-half of the water at that point [i. e. Grand Falls]. Canadian interests could take half of the water at that spot and half could be taken by you, but that is not your proposition; your proposition is to develop all the water at that particular point."⁵⁶ Mr. Hosford admitted that "that is what we have done".⁵⁷ Then the Counsel asked, "Assuming that your project is approved, how will Canadian interests be compensated so as to get their half interest, either in water or waterpowers? How do you explain that can be done? . . . It can not be done at that particular place because you have taken all the water there."⁵⁸ Mr. Hosford replied, "The international river is at Vanceboro and there is a power there . . . then below the junction of these two rivers at Grand Falls."⁵⁹ In other words, he seemed to indicate that Canadian interests could develop power elsewhere on the river and such development was possible.⁶⁰

Mr. MacInnes however challenged this position during his argument. He said to the Commission,

⁵⁴ Opinion, *ibid.*, pp. 9-10.

⁵⁵ *Hearings, St. Croix W. P. Co.*, p. 20.

⁵⁶ *Ibid.*, p. 36.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 53, where Mr. MacInnes says: "the applicants have constructed works clear across the river"—"There *cannot* be development on the Canadian side of the particular point of one-half of the waters as was done at the Soo."

⁵⁹ *Ibid.*, p. 36.

⁶⁰ See in this connection *Hearings, ibid.*, p. 15, before the Committee on Foreign Affairs of the House of Representatives, 64th Cong., 1st Sess., Jan. 20, 1916, statement of Mr. Tawney.

If you come to deal with one part of a river as a set-off against another part of the river, it might perhaps be said that you can deal with a river in British Columbia as setting off a division of a river in New Brunswick. I do not think that could possibly be contemplated by the treaty makers that you were to take all of the boundary waters which have been referred to, and, in dealing with each case, to consider how the balance stood between the two countries. If that is not so, what ground is there for confining the limitation to even the whole of one watershed, as compared with the particular watershed with which you are dealing?"⁶¹

This argument was later conceded by Mr. Tilly,⁶² who was appearing on behalf of the Sprague's Falls Manufacturing Company, Ltd.

Referring then to the point that the rule or principle for "an equal division" could be suspended, "in the discretion" of the Commission, Mr. MacInnes maintained that "no discretion is left to this commission, as is done in the case of conditions", because "the rule is an absolute rule or principle which must be imposed by the commission" since "it is the basis of the agreement between the two parties".⁶³ Judge Koonce, appearing for the War Department of the United States, did not concur with this view. He submitted that "the Commission is . . . empowered by the treaty to suspend the requirement for an equal division in cases of temporary diversions".⁶⁴ To all this Mr. Tilly added that the phrase "in the discretion of the Commission" was important, and applied here because "we are dealing now, not with something you are to determine by any strict rules of legal right, but you are given a discretion

⁶¹ *Hearings, ibid.*, p. 137.

⁶² *Ibid.*, pp. 165-166.

⁶³ *Ibid.*, p. 136.

⁶⁴ *Ibid.*, p. 145.

here under this clause—a discretion that applied to certain eventualities, certain contingencies— . . .”⁶⁵

The question therefore was, “What constituted a ‘temporary diversion’ under the provisions of Article VIII?” Commissioner Glenn (U. S.) consequently asked counsel for the Dominion as to what he meant by the word “temporary”, whether he meant “a week or month or year”.⁶⁶ Mr. MacInnes replied that “this diversion could be authorized *until such time* as the other country should claim its share in the water”.⁶⁷ Judge Koonce fundamentally differed from this position. He indeed admitted that the provision for “equal and similar rights” was “perfectly plain and I apprehend that there is no difference of opinion as to its meaning. Each country is to have *equal and similar rights* in the use of the waters of the St. Croix River, and this being fixed by treaty itself, the commission has no power to change it. If an equal division of the volume of the water is necessary to secure equal and similar rights to each country, such a division must be made.”⁶⁸ But he immediately added that he could “not concur with the learned counsel for the Dominion Government”,⁶⁹ in that the latter’s reply regarding “temporary diversions” involved a question of time alone.

I do not think the eminent statesmen who formulated this treaty had in mind the question of *time* alone, or that by the phrase ‘temporary diversions’ they meant solely the abstraction of water for an hour, or a day, or a year; but my idea is that they had in view the *character* of the diversion rather than its *duration*. Any diversion similar to the one under discussion—where

⁶⁵ *Ibid.*, p. 166.

⁶⁶ *Ibid.*, p. 140.

⁶⁷ *Ibid.* Italics inserted.

⁶⁸ *Ibid.*, p. 146.

⁶⁹ *Ibid.*

water is taken from the natural channel of the river, at a particular point, carried around a fall or rapids, and again deposited in the river—is a *temporary diversion* within the meaning of the treaty.⁷⁰

Commissioner Mignault (Canada) did not seem, however, to agree with the counsel's able argument. "That is not a temporary diversion", said he. "It is a permanent diversion, so far as diversion is concerned."⁷¹ To this Judge Koonce cited what he regarded as illustrations of permanent diversions, where a canal is built for navigation, and is filled with water from a natural stream, or where a flume or ditch is constructed and the water is drawn off to irrigate property and take water from the river for all time; "that is a permanent diversion".⁷² But the Commissioner replied, "Temporary means a certain time. What you say would, to my mind, rather represent a local diversion. You would say, 'I will divert at a point 10 miles from the mouth and return the water five miles below the mouth', and that would be a temporary diversion, although it would continue for all time."⁷³ Judge Koonce maintained his original position. "Here is a particular point", he reiterated, "where these parties take the water from the river, carry it through the flumes and penstocks and deposit back in the river within a very short distance. Every drop comes back. I do not think you can call that a permanent diversion."⁷⁴

This same point was subsequently developed by Mr. Tilly, representing the Sprague's Falls Manufacturing Company on the Canadian side. He started with referring to the

⁷⁰ *Ibid.*, pp. 146-147.

⁷¹ *Ibid.*, p. 147.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

word "temporary" as used in Article II, and said that "the same expression used in two places in the treaty should have the same meaning".⁷⁵ Commissioner Magrath (Canada) was not apparently persuaded by this position, and therefore asked Mr. Tilly, "When you say 'permanent' you mean taking the water elsewhere—away from its natural channel?" The Counsel replied, "Yes, not putting it back".⁷⁶ Thereupon the Commissioner added, "We have a specific case in the treaty where that is done [i. e. taking the water away without returning it to the river] and it is provided for by a special article, namely, Article VI of the treaty. That is the St. Mary and Milk River diversion. There the treaty makers contemplated a permanent diversion of waters crossing the boundary, a diversion where they will not be allowed to return to their natural channel, and to deal with it they created Article VI", giving authority to permanently take the water away from its natural channel.⁷⁷ The Counsel, although objecting to this position of Commissioner Magrath's, submitted that "it is difficult . . . to make an argument as applied to a concrete case which I have never studied, because there is some local study required about it".⁷⁸ "If the point is regarded by the Commission as being against me, I would be very glad to look into it further."⁷⁹ But concerning the diversion involved in the case before the Commission, Mr. Tilly had already pointed out that the Commission has "no power to fix a time which a certain channel is to last. You can permit the water to be temporarily taken out of that *bed*. That is the limitation. These high contracting parties are jointly in-

⁷⁵ *Ibid.*, p. 179.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, p. 180.

⁷⁹ *Ibid.*

interested in this question. You can take it all temporarily, but you must give it back to them by putting in the bed again";⁸⁰ and it should be put back to the stream while it is "on your own property",⁸¹ so that the lower riparian owner can exercise his right.

When these and various other arguments had been submitted, the Commission was able to study the problems presented and hand down its decisions in the form of an order of approval preceded by an opinion. In the course of that opinion the Commission held that Article VIII "expressly declares that each country on its own side of the boundary shall have equal and similar rights in the use of the boundary water, and it refers to this declaration as 'the requirement for an equal division'".⁸² The applicants have not limited their request to a diversion of a part of the waters of the St. Croix at Grand Falls, but they ask practically the whole of the waters at that point.⁸³

Has the commission power to approve of this diversion in the face of the clearly expressed principle of equal and similar rights and division? The treaty says that the requirement for an equal division may, in the discretion of the commission, be suspended in certain cases. The question therefore before the commission is, whether or not the rule can in the case of these applications be suspended, and if it can be suspended, are the circumstances of the case such that the commission should do so?

The cases in which the commission can suspend the rule are cases of 'temporary' diversion at points where an equal division can not be made *advantageously* on account of local conditions, and where such diversions do not diminish elsewhere the amount available for use on the other side.⁸⁴

⁸⁰ *Ibid.*, p. 165.

⁸¹ *Ibid.*

⁸² Opinion, *ibid.*, pp. 10-11.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

Then the Commission, referring to the various interpretations submitted by counsel of the word "temporary", said that that word "temporary" "is somewhat vague and is not a term of exact science";⁸⁵ the word "advantageously" is also "an inexact term".⁸⁶ Consequently without examining the merits or defects of the several able definitions which learned counsel on both sides had submitted with a considerable degree of ingenuity, the Commission declared in its Order :

That the applicants have obtained, or shall hereafter obtain, from the United States and the Dominion of Canada within their respective jurisdictions authority for the maintenance of the said dam as constructed and the obstruction, diversion, and use of the waters of the St. Croix River at Grand Falls, in the State of Maine and the Province of New Brunswick, for the said purpose.⁸⁷

The two companies have constructed and are now using the said dam and power canal at Grand Falls for the purpose of generating power supplied to the pulp and paper mill now owned by the St. Croix Paper Company at Woodland in the State of Maine, a few miles farther down said stream.⁸⁸

In case the waters so diverted cease to be used for the purpose mentioned . . . this order of approval shall thereupon cease to be operative unless the commission upon the application of the United States or the Dominion of Canada, continue it on such terms and conditions as the commission may prescribe.⁸⁹

In other words, if the use of the waters by the paper mill continue indefinitely, the diversion also may be so continued. All the water, if necessary, could be diverted by the appli-

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Order, *ibid.*, p. 5.

⁸⁸ *Ibid.*, p. 4.

⁸⁹ *Ibid.*, p. 5.

cants but must be put back into the stream before the stream left their property, as Judge Koonce and Mr. Tilly argued, so that the lower riparians might not be prejudicially affected.⁹⁰

Another case which involved the principle of "equal and similar rights" arose when the New Brunswick Electric Power Commission wanted to construct certain permanent works in and adjacent to the River St. John at Grand Falls in the Province of New Brunswick. The purpose was to develop power. During the hearings in this case the United States contended through counsel, Mr. Hackworth, that: "We would like to have approval made for exportation to the United States upon request and at a reasonable cost of a portion of the power developed at Grand Falls, the amount to be exported to be determined by the relation which the *United States' half interest* in the head of water on the international section of the stream may bear to the head at the dam."⁹¹ Major Young, who gave the engineering testimony on behalf of the United States, submitted that,

The theory advanced by the United States is that the flow of water along the international section times the fall along that section, in this case sixteen feet, is a potential power which is possessed jointly, half each by the two governments; and that if that sixteen foot fall is, so to speak, added to the rest of the fall at Grand Falls and is therefore removed . . . from the boundary section, the United States has the right to claim a half share in the amount of power corresponding to the flow past the international boundary times the fall along that international section. That claim . . . would be on the basis that we would have the right to import at a fair price on the same basis that

⁹⁰ *Hearings, ibid.*, pp. 140-151; this is the same principle at common law regarding riparian rights; see Walsh, William F., *A Treatise on the Law of Property* (New York, 1927), 2nd ed., pp. 721-723.

⁹¹ *Hearings, N. B. E. P. Co.*, p. 66. *Italics inserted.*

other customers are charged for power. I think that explains the general formula.⁹²

Against these contentions Counsel Lafleur, representing the applicant as well as the Province of New Brunswick, took the following position:

First of all, he [Mr. Hackworth for the United States] said there should be a provision made for the exportation of power, the amount to be determined by their half interest in boundary waters. I respectfully submit that there is no connection whatever between our use of these privately owned lands and the claim now made for an indemnity by way of exportation of power. We are not depriving the United States of any property rights that they have in those waters. . . . The water is backed up on private lands, and whatever additional power we may derive therefrom is not power derived from backing up water on property belonging to the United States or to the State of Maine, it is derived from the backing up of water on private lands; and all we have to do, it seems to me, is to satisfy the owners of these riparian rights by compensating them for the advantage that we get in that way.⁹³

Although the two positions were placed before the Commission for its consideration, there was no need for the Commission to pass upon the question, because the applicant Power Commission had "agreed to furnish 2,000 H.P. for use in the State of Maine at a price which in effect is not greater than that charged to like consumers of power in the Province of New Brunswick".⁹⁴ This agreement had been made with the International Paper Company at Van Buren on the American side.⁹⁵ It was not an order of the Commission, although in its approval the Commission said that in case

⁹² *Ibid.*, p. 67.

⁹³ *Ibid.*, p. 90.

⁹⁴ Order, *ibid.*, p. 2.

⁹⁵ *Hearings, ibid.*, p. 117.

the above mentioned 2,000 H. P. cease to be available for use in the United States at any time for any reason this Commission reserves the rights of the parties to reopen the question and ask for a decision on the above contentions. And until this Commission renders a decision on such questions the Applicant shall in accordance with its undertaking in that behalf make available at least 2000 H. P. for use in the United States upon receiving reasonable notice in writing requiring it so to do unless relieved by order of the Commission from so doing.⁹⁰

Thus the Commission avoided specifically passing upon the question of equal and similar rights in this case.

The second rule or principle which the Commission has to observe in passing upon cases under Articles III and IV provides for an "*order of precedence*" regarding the "uses" of the boundary waters. The first is "uses for domestic and sanitary purposes".⁹⁷ The importance of this primary classification cannot be overestimated. Along the international boundary and in the watershed of the international waters millions of people live engaged in agriculture, or industry or other vocations. Along the banks of the Great Lakes and rivers, "communities which a few years ago were mere villages are now in population, in social and industrial development among the most important on the continent".⁹⁸ Furthermore, along the boundary waters, "the people of the United States and Canada fraternize socially, select and patronize their summer resorts, invest their capital and engage in industries and enterprises, almost without regard to territorial sovereignty".⁹⁹ The domestic needs of these populations therefore had primarily to be cared for.

⁹⁶ Order, *ibid.*, p. 3.

⁹⁷ Article viii.

⁹⁸ *Final Report on Pollution of Boundary Waters*, p. 7 (Washington, 1918).

⁹⁹ *Ibid.*, p. 29; *A. J. I. L.*, vol. iv, 1900, p. 668.

In giving first consideration to these uses it would appear that the treaty has followed the common law rule that the riparian owner has the right to use the water of the stream "for the purpose of supplying his natural wants, such as quenching the thirst of his family and his cattle and the use of it for cooking purposes",¹⁰⁰ provided such uses do not result in material injury to the size and flow of the water.¹⁰¹ The primary importance of such uses in connection with the boundary waters between the United States and Canada seems to have been quite clear to the minds of the negotiators of the treaty of 1909, and naturally therefore they gave precedence to such uses in the treaty, over against any other. So far, however, there has been only one case which has been presented to the Commission under this rule touching the uses of the boundary waters. The application of the Greater Winnipeg Water District was for the purpose of diverting the waters of Shoal Lake and the Lake of the Woods for "the domestic and sanitary purposes",¹⁰² of seven Canadian cities¹⁰³ comprising at that time a total population of 264,691 people.¹⁰⁴ The Commission, as already noted, granted the application.¹⁰⁵

¹⁰⁰ See in this connection, Farnham, *Water Rights* (New Haven, 1904), vol. i, p. 288; also vol. iii, p. 1898, sec. 600; Walsh, *op. cit.*, pp. 638-639, and see cases there cited.

¹⁰¹ *Ibid.*

¹⁰² Application, *G. W. W. Dist.*, p. 3.

¹⁰³ *Ibid.*

<i>Cities</i>	<i>Population</i>
Winnipeg	191,067
St. Boniface	9,100
Transcona	1,632
Assiniboia	6,000
Fort Gary	3,000
St. Vitae	1,817
Kildonan	2,075

¹⁰⁴ Opinion, *ibid.*, p. 3.

¹⁰⁵ Order and Opinion, p. 2.

The second class of uses which the Commission has to prefer under Article VIII is "uses for navigation, including the service of canals for the purposes of navigation."¹⁰⁶ In a previous chapter the various provisions of treaties affecting navigation of the boundary waters and connecting canals were examined, and there it was pointed out that these waters were a natural transportation highway for a considerable degree of interstate and international commerce.¹⁰⁷ There is nowhere in the world another "water thoroughfare comparable with the highway leading from the Gulf of St. Lawrence to the head of Lake Superior". To improve the navigation on these waters the United States Government has spent over 135,000,000 dollars and the Dominion Government over 250,000,000 dollars, in such projects as constructing harbors, canals, and deepening channels. The result is that "vessels drawing 19 or 20 feet can now navigate the Great Lakes from Duluth or Chicago to Buffalo";¹⁰⁸ and when it is further pointed out that the "vessel passages up and down the Detroit River in 1916 amounted to 37,852, the registered tonnage of the vessels reaching 76,677,264, their passengers including ferry passengers numbering 15,000,000, and their freight 100,000,000 tons valued at something over \$1,000,000,000",¹⁰⁹ the reason why navigation interests were given an important place in the treaty of 1909 becomes quite clear.

In this connection too it is interesting to observe that navigation uses follow in the order of preference the primary use of domestic and sanitary purposes accorded the riparian owners at common law. Except in these primary riparian uses, in all "other respects the public rights of navigation

¹⁰⁶ Article viii.

¹⁰⁷ See chap. ii.

¹⁰⁸ *Final Report, P. B. W.*, p. 7.

¹⁰⁹ *Ibid.*

are superior to those of the riparian owners".¹¹⁰ It may be observed, however, that the treaties of 1842¹¹¹ and 1871¹¹² concluded between the United States and Great Britain had made special provisions for protecting navigation on the boundary waters. There is no provision in either of these agreements respecting the domestic and sanitary uses of these waters by the people inhabiting the two sides of the line. On the other hand, the treaty of 1909 not only provides for such primary uses, but also has given precedence to such uses over uses for navigation, as at common law.¹¹³

Several cases that were before the Commission involved questions of navigation. The first case wherein there was an implied reference to this point was in fact the very first case which the Commission disposed of after its organization. In the case of the Rainy River Improvement Company, counsel for the Rainy River Lumber Company opposed the contemplated construction of a dam by the former company in Kettle River on various grounds. One of these was that the project would be a violation of the Webster-Ashburton Treaty of 1842, according to which the water concerned was to be "free and open to the use of the citizens and subjects"¹¹⁴ of "both nations without interference and without interruption".¹¹⁵ This use naturally implied navigation. The Commission, however, disposed of the case on the basis that it lacked jurisdiction in the premises, because the Commission decided it was a case of "special agreement", and the Commission's jurisdiction

¹¹⁰ Farnham, *op. cit.*, vol. i, p. 289.

¹¹¹ Webster-Ashburton Treaty.

¹¹² Treaty of Washington.

¹¹³ Farnham, *op. cit.*, vol. i, pp. 130, 138; Moore, *op. cit.*, vol. i, p. 267.

¹¹⁴ Art. ii, Webster-Ashburton Treaty.

¹¹⁵ *Hearings, Rainy River Improvement Co.* (Washington, 1913), p. 78, Mr. Watson.

thereupon is excluded under the provisions of Articles II, III, IV and XIII. Therefore it did not have to pronounce on the several problems involved.¹¹⁶

In the application of the Watrous Island Boom Company, for approval of the Commission of plans to construct booms and sorting gaps in the Rainy River between the mouths of the Little Fork River and Black River, the Commission required provisions to safeguard the interests of navigation before its approval was given. During the hearings in this case several witnesses¹¹⁷ submitted that "navigation was obstructed by the works" that were already in the river and therefore improvements had to be made. As a result the Commission in its order of approval incorporated a clause which read: "Provided certain changes were made in the construction of the boom and the channel dredged, it was admitted on all sides that the navigation of the river would not be seriously interfered with."¹¹⁸

Another company sought the Commission's approval of a plan to reconstruct a boom in Rainy River at International Falls, Minnesota. This application, which had been filed by the International Lumber Company, was opposed by the Canadian Government on the ground that "the proposed boom would seriously encroach on the rights of navigation as at present enjoyed by the citizens of Canada and the United States".¹¹⁹ The Government of the United States also filed a statement with the Commission, in which it represented "that the present and future needs of navigation in

¹¹⁶ Docket No. i.

¹¹⁷ Mr. Giles, Order of Approval, Watrous Island Boom Co. (Washington, 1913), p. 8; Capt. Black, *ibid.*, p. 12.

¹¹⁸ Order of Approval, *W. I. B. Co.*, p. 16, conclusion 5, also *ibid.*, p. 18 (conditions) Docket ii.

¹¹⁹ Order of Approval, *International Lumber Co.* (Washington, 1917), p. 4.

the Rainy River be carefully safeguarded in any decision made on the said application".¹²⁰ The Commission therefore in its order of approval enjoined upon the applicant company to "remove and reconstruct its existing boom along the lines indicated in the approval of the Secretary of War"¹²¹ of the United States who had proposed the necessary changes to the applicant when the latter had sought the approval of the War Department.¹²²

The next case involving navigation was brought in by the Government of the United States which applied for the Commission's approval of plans for certain improvement works in the channel of the River St. Clair with a view to facilitate navigation on the United States side of the river. In this case also the Commission issued an order of approval with certain conditions attached to it.¹²³

Another case involving navigation came before the Commission when the New York and Ontario Power Company sought the approval of the Commission to reconstruct and repair a dam and certain hydraulic structures in Little River at Waddington-on-the-St. Lawrence, N. Y. The applicant's compensation works consisted of an embankment from Ogden Island to Canada Island and a submerged weir near the head of the former island below navigation depth in the St. Lawrence River. In consideration of the possible benefits from the constructions proposed, such as eliminating dangerous crosscurrents in the river, the applicant further requested that he be allowed to divert from the St. Lawrence River a specified volume of water without prejudicially affecting the navigation on that river.

Against this application several objections were filed by

¹²⁰ *Ibid.*, p. 5.

¹²¹ *Ibid.*, p. 7.

¹²² Docket no. xii.

¹²³ Docket no. xiii, see p. 91 *et seq.*

various bodies, such as the Dominion Marine Association, which submitted that the proposed works would injuriously affect navigation interests on the St. Lawrence by decreasing the flow in the Rapide Plat, "a dangerous passage even with the existing flow".¹²⁴ The Dominion Government pointed out not only that the works would be detrimental to navigation but also that they would interfere with the complete regulation of the level and flow of Lake Ontario. Both the Marine Association and the Government insisted that the "enormous potentialities of the St. Lawrence system in regard to navigation should be developed in the most efficient manner, and that applications for private enterprises should not be granted as they would hinder the future development of the St. Lawrence system as a whole".¹²⁵ In this connection Commissioner Tawney asked the President of the applicant company who appeared as a witness: "Mr. Connolly, it is also true, is it not, that the improvement in deep-water navigation from tide-water to the lakes between Canada and the United States has been under contemplation ever since 1872, when the International Commission was created for that purpose?" To this Mr. Connolly answered, "Yes".¹²⁶ This admission added weight to the contention of the Counsel for the Dominion Government that, compared with the problem that has been a matter of study between the two Governments, the subject matter of the application was but a "picayune matter".¹²⁷ "Now if you are asking us to give up something", said the insistent Counsel, "that will injure our big development scheme, we

¹²⁴ *Papers of the I. J. C.*, pp. 133-134; *Hearings, New York & Ontario Power Co.* (Washington, 1919), Chief Hydrographers' remarks, p. 220.

¹²⁵ *Papers of the I. J. C.*, pp. 133-134.

¹²⁶ *Hearings, N. Y. O. P. Co.*, p. 30.

¹²⁷ *Ibid.*, p. 323.

will not do it. There is plain language for you.”¹²⁸ “If the judgment of the Commission conflicts with that of our engineers, we certainly will be guided by the judgment of our engineers. . . .”¹²⁹ “And I frankly tell you that Canada will not consent”¹³⁰ to the proposed works of the applicant. Despite the emphatic submissions of Counsel for the Dominion, the decision of the Commission would be, under proper circumstances, binding on the Dominion under the terms of the treaty.

After the hearings were over, the applicant company wanted a decision. A further hearing was called for by the Commission, but the company applied for an indefinite postponement. The matter therefore is still pending.¹³¹

From the foregoing cases it is possible to estimate the importance of navigation on the boundary waters. Whenever obstructions, diversions or other uses of these waters are contemplated by any parties, public or private, such projects must necessarily be authorized by the Commission, which will see to it that they do not affect the level or flow of the boundary waters, or come in conflict with the fundamental privilege of navigation mutually enjoyed by the Contracting Parties, on these boundary waters,¹³² by virtue of several prior treaties.

The last class of uses, according to the order of precedence in Article VIII, is “uses for power and for irrigation purposes”. On the American continent hydro-electric power production is becoming more and more important. Already several millions of dollars have been invested in power projects in sections like the Sault Ste. Marie, the

¹²⁸ *Ibid.*, p. 320.

¹²⁹ *Ibid.*, p. 318.

¹³⁰ *Ibid.*, p. 330; also see pp. 283-284.

¹³¹ *Papers of the I. J. C.*, p. 135.

¹³² *I. L. Co.*, Opinion, p. 14; see also Article v.

Niagara and the Upper St. Lawrence. While dealing with the question of the Niagara River and the division of its waters as provided for in Article V of the treaty, the Contracting Parties decided upon a principle of proportionate division rather than of equal division as is contemplated in Article VIII, in order to inflict "the least possible injury to investments which have been already made in the construction of power plants" ¹³³ on both sides of the river.

The two applications of the Michigan Northern Power Company,¹³⁴ and the Algoma Steel Corporation, Ltd.,¹³⁵ were for approval of works which were intended and planned to accomplish "the obstruction and diversion of the waters on their respective sides of said river [St. Mary's River at Sault Ste. Marie] in the United States and Canada for power purposes". The applications of the St. Croix Water Power Co.,¹³⁶ and the Sprague's Falls Manufacturing Co.,¹³⁷ were to obtain the approval of the Commission to construct a dam and a power canal at Grand Falls in the St. Croix River between the State of Maine and the Province of New Brunswick.¹³⁸ So also were the two applications of the New Brunswick Electric Power Commission ¹³⁹ and the St. John River Power Company,¹⁴⁰ wherein they

¹³³ Article v; also see (U. S.) War Dept. Doc., no. 1039, p. 55 for a list of the various power plants and industries.

¹³⁴ Docket no. vi.

¹³⁵ Docket no. viii.

¹³⁶ Docket no. x.

¹³⁷ Docket no. xi.

¹³⁸ Docket no. xi.

¹³⁹ Docket no. xix: "The applicant proposes to develop the natural waterpower at Grand Falls for the purpose of producing and transmitting hydro-electric power to meet the present and future requirements of the Province of New Brunswick," p. 7, Order of Approval, etc., *N. B. E. P. Co.*, p. 7.

¹⁴⁰ Docket no. xxii.

respectively sought the approval of the Commission for constructing certain works at Grand Falls in the St. John River between the State of Maine and the Province of New Brunswick. One of the fundamental issues in the former case was whether or not the United States was entitled under Article VIII of the treaty to have her legitimate share in the power intended to be produced by the New Brunswick Power Commission. Although the Commission did not decide this vital question, it was satisfied, as were the parties concerned, that the Power Commission had, in a contract with the International Paper Company in Maine, consented to the delivery of 2000 horse-power of electrical energy produced at Grand Falls, to the latter company.

The application of the St. Lawrence River Power Company¹⁴¹ sought the approval of the Commission for the construction of a submerged weir in the South Channel of the St. Lawrence River near the mouth of its power canal at Massena, N. Y. In this case Commissioner Powell (Canada) wrote an independent opinion in which, agreeing with the decision of the Commission, he dealt with "the legal phases of the question"¹⁴² and said that if the South Channel were excluded from "boundary waters", then Canada is "not entitled to any share whatever of its undeveloped power".¹⁴³ Finally, the yet undecided application of the New York & Ontario Power Company¹⁴⁴ also involved the construction and repair of a dam and certain hydraulic structures for the development of power in Little River at Waddington-on-the-St. Lawrence, N. Y.

As far as irrigation is concerned, it does not appear that

¹⁴¹ Docket no. xv.

¹⁴² Powell's Opinion, *St. Lawrence River Power Co.* (Ottawa, 1918), p. 23.

¹⁴³ *Ibid.*, p. 15.

¹⁴⁴ Docket no. xiv.

the Commission has been called upon to decide any case so far. This fact does not mean, however, that problems of irrigation may not yet arise on the boundary, since its western half lies within regions predominantly agricultural. Even here it may be noted that the framers of the treaty of 1909 followed the lines of the common law in preferring domestic and sanitary uses and navigation to irrigation.¹⁴⁵

Rule 3: After establishing the necessary rules of precedence for the three classes of uses already discussed, Article VIII in its fourth section makes an exception, as in Articles II, III, and IV, to the effect that "the foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side".¹⁴⁶ In this connection it will be of value to examine a few cases.

When the Watrous Island Boom Company applied to the Commission for the erection of certain booms in the Rainy River between the mouths of Little Fork and Black Rivers, the Department of Public Works of the Dominion of Canada alleged that the applicant company had already certain booms and piles in the river which obstructed navigation. "Many complaints have been received", read the statement, "from the navigation interests, both by letter and personally, that the boom interferes with free navigation."¹⁴⁷ The United States Engineers' Office also pointed out in its correspondence that "the capacity of the present sorting works" should be "doubled"¹⁴⁸ in order to facilitate navigation.

While Counsel Thompson, representing the Department of Public Works of the Dominion, read the statement of that

¹⁴⁵ Farnham, *op. cit.*, vol. iii, p. 1898.

¹⁴⁶ Article viii.

¹⁴⁷ *Hearings, W. I. B. Co.*, p. 46.

¹⁴⁸ *Ibid.*, p. 28.

Department to the Commission, Commissioner Turner (U. S.) made the following remark:

There is one view of the matter that strikes me, and I would like to suggest it to Mr. Thompson. This application is for a prospective boom according to the plans. This commission really has nothing to do with the boom already in the river, which is partly on the Canadian side and partly on the American side. It has no powers of a court to abate a nuisance in the river there. All that it can do is to consider the plans presented to it with respect to the boom and either allow them or disallow them. If it allows them, I presume it has the right to make such changes in the plans proposed as would protect navigation, but so far as the reference of the paper that you just read to a boom already there is concerned and to abating portions of it that impede navigation, that is a matter, it strikes me, that belongs to the two respective Governments. The Government of Canada, through its authorities can abate any portion of this boom on the Canadian side and the United States, through its authorities, can do the same thing on its side, but no power of that kind is committed to this commission.¹⁴⁹

No objections were raised against these remarks of Commissioner Turner; in fact, they appear to be a sound view of, because in harmony with, that provision of Article VIII which has excluded "existing uses of boundary waters on either side" from the jurisdiction of the Commission.¹⁵⁰

Consequently in the approval granted to the applicant Company the Commission ordered that "the four clusters of piles immediately opposite Lot 2, section 25 . . . be removed and redriven. . . ." ¹⁵¹ From this order of approval, it would appear that the Commission cannot order

¹⁴⁹ *Hearings, ibid.*, p. 48.

¹⁵⁰ Article viii.

¹⁵¹ Order, *W. I. B. Co.*, p. 18.

changes in existing uses; but if such uses would call for repairs, removals or reconstructions, they would require the approval of the Commission.

This point is further developed in the following case, that of the St. Croix River Fishways. Mr. Willis E. Parsons, Commissioner of Inland Fisheries and Game for the State of Maine, filed an application with the Commission on May 24, 1923, "to grant consent and authority to all dam owners on said St. Croix River, to wit, international boundary, to erect such fishways as may be approved by said Commissioner for Maine and the legal representative of the Canadian Government . . . granting your consent and approval to such construction of new fishways and future *repairs of existing fishways*".¹⁵² This application was filed on the assumption that the amount of water used for a fishway is "negligible and not a material 'diversion' of boundary waters on the other side of the line, as contemplated in Article III of the treaty"¹⁵³ of 1909, or "if it should be found to be a technical diversion", it would be a "*diversion heretofore permitted*" as referred to in Article III, and not "further or other use" as would be affected by the treaty. Further, the application would be proper only if the Commission "shall find and determine that new construction of said fishways, or the repairs of any of the said fishways on said dams above referred to on said international waters of however long standing . . . is under the jurisdiction of your Honorable Commission".¹⁵⁴ Some of these fishways had been constructed and "maintained for more than a generation or since 1867",¹⁵⁵ so

¹⁵² Application, *St. Croix River Fishways* (Washington, 1924), p. 3. Italics inserted.

¹⁵³ *Ibid.*; see also *Hearings*, pp. 14-15.

¹⁵⁴ *Ibid.*, p. 3.

¹⁵⁵ *Ibid.*

that the applicant concluded they would be regarded as diversions "heretofore permitted". He also conveyed the impression that the application, being not for "further or other use", was at least partially for improving a use either existing or neglected. It was because of these circumstances that the applicant prepared his petition to the Commission "to know what the International Joint Commission that had charge of all these waters would say".¹⁵⁶

The Commission, however, after proper deliberation upon all the material at its disposal in the light of the issues raised, handed down an order of approval on October 3, 1923, authorizing "the construction and repair of the . . . fishways in accordance with the plans heretofore agreed upon between the Commissioner of Inland Fisheries . . . and the Department of Marine and Fisheries of Canada".¹⁵⁷

This case, as well as the Watrous Island Boom Company's case, seem to point out that, although the Commission has no jurisdiction over uses "heretofore permitted" or "hereafter" to be permitted by "special agreements" between the Contracting Parties, nevertheless it would have the necessary jurisdiction over alterations, reconstructions or repairs in such existing uses.

(4) POWER TO REQUIRE SUITABLE AND ADEQUATE PROVISION

A. Remedial Works

Under the provisions of Article VIII, the Commission is given power to approve any use, or diversion of the waters mentioned in Articles III and IV. In giving its approval, the Commission may impose upon the applicants, whether they are public or private, certain conditions in the form of "remedial and protective works to compensate so far as

¹⁵⁶ *Ibid.*, p. 13, also p. 126.

¹⁵⁷ Order, *St. Croix R. Fishways*, p. 2.

possible for the particular use or diversion proposed".¹⁵⁸ In such a case the Commission is given the discretion to require that suitable and adequate provision approved by the Commission be made "for the protection and indemnity against injury of any interests on either side of the boundary".¹⁵⁹

But if any use or obstruction of these waters would result in "the elevation of the natural level or flow of waters on the other side of the line", or in waters flowing from boundary waters or "in waters below the boundary in rivers flowing across the boundary",¹⁶⁰ then the Commission has no option to exercise its "discretion" as in the above case; because the article says that where the elevation of the level or flow of the waters is concerned, "the Commission *shall require*, as a condition of its approval, . . . that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby".¹⁶¹ Briefly, in cases where the use or diversion of the waters would *not* raise the levels, the Commission "may require"¹⁶² compensating or remedial works, while where the levels would be raised, the Commission is bound to require—"shall require"¹⁶³—the necessary provisions which would afford adequate protection to interests on the other side of the line which may be prejudicially affected.

One of the most clear-cut cases in which the Commission applied this mandatory rule was that of the New Brunswick Electric Power Commission in 1925. The ap-

¹⁵⁸ Article viii.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, italics inserted.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

plicant in this case proposed to construct a storage dam and other permanent works in and adjacent to the channel of the River St. John, at Grand Falls in New Brunswick. The purpose was, as has already been indicated elsewhere in this chapter, to develop water power to meet "the present and future requirements of the Province of New Brunswick".¹⁶⁴ The applicant Power Commission, nevertheless, admitted in its application that the works would maintain a high water stage in the immediate vicinity of the dam, and would "pond the water back for about thirty-two miles at an elevation somewhat above low watermark".¹⁶⁵ The result would be that an area of 800 acres of partially arable lands and partially sandy and gravel regions would be submerged, four hundred acres in the State of Maine and four hundred in Canada.¹⁶⁶

Under these circumstances various objections were raised by the parties adversely affected on both sides of the line. The Canadian National Railways submitted that some of their culverts would be submerged; that at certain points they would be bound to riprap their "right of way for certain distances", and that therefore whatever order the Commission made, the Commission should see that adequate protection of the "vested rights" of the Railways was enjoined upon the applicant.¹⁶⁷ Counsel for the Canadian Pacific Railway also pointed out that their "railways are on made ground, and the effect of waters on that ground is quite different from what it would be on the hard mother earth. It is hard to anticipate, and we should not have the responsibility of anticipating, what is going to happen in

¹⁶⁴ Application, Order of Approval, *Hearings, N. B. E. P. Co.*, pp. 6-7.

¹⁶⁵ *Ibid.*, p. 9.

¹⁶⁶ *Ibid.*, p. 10.

¹⁶⁷ *Ibid.*, pp. 21-22 (Mr. Milligan).

every contingency. That is why I think we should have a general undertaking to protect us against all consequences arising against this encroaching on our land from this interference with the franchises.”¹⁶⁸

The Bangor and Aroostook Railroad Company incorporated under the laws of the State of Maine, represented to the Commission through counsel that any change in the flow and water-levels of the St. John, as contemplated in the application of the Power Commission, would “result in many serious physical disabilities” to the Railroad Company, and would “materially interfere with the use of its property”. Further, it would endanger the international railroad bridge and injure the property of the Van Buren Bridge Company¹⁶⁹ as well.¹⁷⁰ The International Paper Company, another American corporation, and the Grand Falls Company of the Province of New Brunswick, jointly responded that their lands “acquired by the Paper Company solely for the use by the Falls Company in the development of the Grand Falls power, will be overflowed through the backing of the water by the dam which the applicant proposes to build”.¹⁷¹ The St. John Lumber Company of Maine also made certain representations before the Commission, that the proposed project of the Power Commission would “result in certain future injuries to property of the Lumber Company”.¹⁷² Thus all the various parties who would be prejudicially affected by the construction of the proposed works of the New Brunswick

¹⁶⁸ *Ibid.*, p. 25.

¹⁶⁹ Van Buren Bridge Co. is a “subsidiary company” of the Bangor and Aroostook Railroad Co.; *Hearings, ibid.*, p. 33.

¹⁷⁰ Statement in response, *ibid.*, pp. 192-193; also Mr. Hart, *ibid.*, pp. 33-34.

¹⁷¹ Statement in response, *ibid.*, p. 199; *ibid.*, p. 49, Mr. Montgomery.

¹⁷² Agreement: Schedule A, *ibid.*, p. 174; *ibid.*, pp. 47-48.

Electric Power Commission, made their representations; but all of them were willing that the project should go on, provided the Power Commission consented, through written agreements which would form part of the order of approval of the Joint Commission, to make adequate compensation to the injured parties.¹⁷³

The Power Commission therefore entered into several agreements with the various companies, while the case was still being heard, and the International Joint Commission subsequently issued an order of approval of the projects, incorporating, however, such agreements as parts of that order,¹⁷⁴ thereby fulfilling the rule of adequate and suitable provisions which the Commission "shall require" as a condition of its approval.

In the case of the Michigan Northern Power Company and that of the Algoma Steel Corporation, Ltd., the levels of the St. Mary's River at Sault Ste. Marie, and of Lake Superior, were affected on the other side of the line. This position was conceded by the applicants and by both Governments, as well as by the various municipalities on both sides of the boundary. But "no application was made by any one"¹⁷⁵ who appeared before the Commission for additional protective works other than those which the applicants themselves had proposed, nor "for any other relief on account of anticipated injury or damage in consequence of the construction, maintenance, and operation of the proposed works".¹⁷⁶ All that the parties wanted was that the control of the works should be vested in an inter-

¹⁷³ Statements in response, *ibid.*, pp. 190-201; see also similar case in *St. John River Power Co.*

¹⁷⁴ Order of Approval, *ibid.*, pp. 2-3.

¹⁷⁵ *Hearings, Michigan Northern Power Co.* (Washington, 1914), p. 153, Mr. Young for Fort William and Port Arthur.

¹⁷⁶ Order of Approval (Washington, 1917, reprinted), p. 7.

national board of engineers¹⁷⁷ representing the two countries. The Commission therefore, after prolonged consideration, because of the character and importance of the works, approved the application, satisfying itself that the conditions and compensating works which the applicant had proposed to construct and internationally operate were "suitable and adequate provisions" under the compulsory rule of Article VIII.¹⁷⁸

When the application of the Creston Reclamation Company of British Columbia proposed the construction of certain works to "reclaim a portion of the lands adjacent to the Kootenay River"¹⁷⁹ in British Columbia and render them commercially valuable for agricultural purposes, the question arose whether or not great damage might be done on the other side of the line. The applicant company had admitted that when the construction of the works was completed "the peaklevel of the flood in the River will be somewhat higher than in its natural state. The River surface will also assume a hydraulic gradient greater than the normal one, with an increased velocity of flow."¹⁸⁰ The United States Government, through counsel, represented that the proposed works "will cause injury to interests on the United States side of the boundary, or be a potential source of injury, and that therefore no order of approval should be issued by the Commission which fails to take such interests into account and to require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity of all such interests pursuant to the provisions of Article VIII of the Boundary

¹⁷⁷ *Hearings*, p. 158, Mr. Hoyt for Duluth and City of Superior; see also *ibid.*, p. 206.

¹⁷⁸ *Order of Approval*, pp. 5-6.

¹⁷⁹ *Application, Creston Reclamation Co.*, p. 4.

¹⁸⁰ *Ibid.*, p. 5.

Waters Treaty.”¹⁸¹ When therefore the Commission ordered its approval, it specified such protective and remedial works as appeared to it adequate and suitable.

Thus in all cases that have been decided by the Commission, wherein the elevation of the natural levels of the boundary waters was involved, causing injury on the other side of the line, the Commission has always required that the applicant in question should make suitable and adequate provisions as prescribed by Article VIII.

B. *Boards of Control*

In several instances where suitable and adequate provisions have been ordered by the Commission in the nature of remedial and protective works, need arose to establish other agencies for their supervision and regulation. These agencies are called the boards of control.

The first occasion for a board arose with the project of the Michigan Northern Power Company. This company wanted to obstruct, divert and use the waters of the St. Mary's River at the Sault Ste. Marie, (Mich.). St. Mary's is the natural outlet of Lake Superior with its immense area of 32,000 square miles¹; the obstruction of the river therefore was bound to raise the natural level of the international boundary waters on both sides.² All the parties involved in the case, however, agreed during the hearings that if the works were constructed according to the plans and efficiently operated, they would compensate for the diversion. But operation could not be had automatically; it had to be, as Commissioner Tawney said, “mechanically with the aid of human agencies”.³ Consequently, “the two Governments

¹⁸¹ *Ibid.*, p. 80, letter of Counsel Charles M. Barnes.

¹ Opinion, *M. N. P. Co.*, p. 16.

² Order, *ibid.*, p. 23.

³ Opinion, *ibid.*, p. 23.

proposed . . . that there should be a board of control, consisting of two members, one to be appointed by each Government; that this board be authorized to formulate rules under which the compensating works of the applicant, its power canals, and head gates and by-passes, shall be operated so as to secure as nearly as may be the regulation of Lake Superior within the range of monthly mean level recommended and found necessary.”⁴ The Commission approved the proposal and ordered that: “The officer of the Corps of Engineers charged with the improvement of the Falls of the St. Mary’s River on the American side and an officer appointed by the Canadian Government shall form said board whose duty it shall be to formulate rules under which” the proposed works of the applicant “shall be operated”.⁵ The same board was made responsible for the operation of the works of the Algoma Steel Corporation, Limited, on the Canadian side of the Sault Ste. Marie (Ontario).⁶

Similarly in the cases of the St. Croix River Power Company and the Sprague’s Falls Manufacturing Company, Limited, there was a provision for a board of control. In these cases the point has to be noted that a board of control was not ordered before construction was undertaken by the applicants, but afterwards; consequently during the hearings, counsel for the Dominion submitted that it did “not appear common sense” to him “to make an argument which would suggest . . . that a \$1,000,000 work should be destroyed. I would not make such an argument if the treaty can be carried out in any other way.”⁷ To this Commissioner Powell (Canada) replied, “We would make a provision in our order

⁴ Opinion, *ibid.*, p. 16; *Papers of the I. J. C.*, p. 84; *A. J. I. L.*, vol. 22, 1928, pp. 292 *et seq.*

⁵ Order, *M. N. P. Co.*, p. 7.

⁶ Order, *Algoma*, p. 8; *Papers of the I. J. C.*, p. 124.

⁷ *Hearings, St. Croix W. P. Co.*, p. 55.

that in the event of a Canadian Company coming on, with development on the Canadian side, that the works of both should be under the control of a joint board, to let the water flow through, as we provided for at the Soo,"⁸ i. e. at Sault Ste. Marie.⁹ Later in the same case Commissioner Tawney (U. S.) asked the Chief Hydrographer for Canada, Mr. Stewart, as to what he had "to say about the international regulation of the operation of the dam." Mr. Stewart replied that he thought "all dams across international rivers should be under some joint control."¹⁰ . . . Any sort of joint control that would be fair¹¹ . . . I think it would be fair to all parties on the river to establish joint control."¹² This position was agreed to by counsel for the Dominion when Commissioner Tawney asked him whether he had anything to say "in regard to the interest of the Dominion Government in the matter of international regulation of these works, if they are maintained as now constructed."¹³ Mr. MacInnes replied "As to that, I would naturally be governed by the views of Mr. Stewart as chief hydrographer. If he considers that, from an engineering standpoint, that some kind of control is necessary, I would accept his views, and as to the extent to which they should be applied, the commission would decide."¹⁴

No objection appears to have been urged against Mr. Stewart's position. Consequently when the order of approval was issued by the Commission, it was provided that there should be a board of control consisting of two officers,

⁸ *Ibid.*, Docket no. viii.

⁹ Order and Opinion, *M. N. P. Co., Algoma*.

¹⁰ *Hearings, St. Croix W. P. Co.*, p. 123.

¹¹ *Ibid.*, p. 124.

¹² *Ibid.*, p. 124.

¹³ *Ibid.*, p. 142.

¹⁴ *Ibid.*

one to be appointed by the Governor-General in Council and the other to be appointed by the Secretary of War of the United States.¹⁵ This board was given the power to formulate necessary rules to regulate the works as well as to "secure to the users of water, below Grand Falls the flow of water to which they are entitled".¹⁶

The last case in which a board of control was ordered involved the constructions proposed by the St. Lawrence River Power Company.¹⁷ Thus, under the provisions of Article VIII, the Commission has set up three different boards to regulate the works of five different companies.¹⁸ But none of these boards has been created by the Commission upon its own initiative as part of the "suitable and adequate provisions" which it is competent to require; nor has it been called upon to decide whether, under Article VIII, it has the power to create a board where one party demands it while another opposes it, or where none of the parties demand it. If in its "discretion" the Commission determines that a board should be created for the control and regulation of the remedial and protective works which it may have required and ordered, has the Commission the power to create boards of control? Or should the Governments, the High Contracting Parties to the treaty of 1909, create such agencies of administration as occasions arise?

No specific answers can be given to these questions; nevertheless certain facts will be considered here which may shed some light upon them.

¹⁵ Order, *ibid.*, p. 6.

¹⁶ *Ibid.*

¹⁷ Interim Orders, *St. Law, R. P. Co.*, 1918, 1922, see p. 134.

¹⁸ Michigan Northern Power Co. }
 Algoma Steel Corp. Ltd. } 1 board
 St. Lawrence River Power Co., 1 board
 St. Croix Water Power Co. }
 Sprague's Falls Mfg. Co. } 1 board

1. *From the language of Article VIII:*

Article VIII authorized the Commission to "require" "suitable and adequate provisions."¹⁹ It does not define what would constitute these provisions and under what circumstances. It merely grants what may be regarded as *carte blanche* to the Commission, thereby conferring upon it the necessary power to "require", "approve" and order suitable provisions. A power to require and approve is certainly distinct from a power to create. The treaty, on the whole, makes no express provision which gives the Commission such a power.

2. *From the action of the Commission:*

The history of the boards of control gives no clear indication of the attitude of the Commission to the question of its power to create these boards. In each case the board of control has been set up upon the proposal and by the agreement of the two Governments.²⁰ The share of the commission was essentially one of approving the proposals placed before it by the Governments. If a power of creating boards were vested in the Commission, there would be no need of approving the proposals but of decreeing the creation of the boards under appropriate circumstances. So far the Commission has not ordered the creation of a single board.

3. *From the responsibility of the Boards approved under Article VIII.*

There are, as elsewhere noted, three different boards of control in existence at the present time, controlling and regulating the remedial and protective works of five different companies.²¹ When the first board was approved for the Michi-

¹⁹ Article viii, section 6.

²⁰ See p. 125 *et seq.*

²¹ *Ibid.*

gan Northern Power Company, the Commission ordered that "in the event of a disagreement between the members of the said board, in respect to anything required of said board herein or in respect to the duties or powers of said board or as to the exercise of such duties or powers, the question at issue shall, upon the application of either Government, be referred to this Commission for its decision."²² Similar provisions were inserted in the orders issued to the Algoma Steel Corporation, Limited,²³ the St. Croix Water Power Company,²⁴ and the Sprague's Falls Manufacturing Company.²⁵ These orders clearly indicate that the members who constitute the boards are primarily responsible to their respective Governments, and not to the Commission.

There is, however, an exception to be noted here, and that is in connection with the St. Lawrence River Power Company's board, the last one to be ordered by the Commission.²⁶ Here in case of disagreement among the members of the board, "in the execution of their powers, the board of control shall apply to the commission for directions, and further, shall have the right to apply in any circumstances where deemed necessary and advisable".²⁷ This exception was due to the fact that the interests of navigation on the St. Lawrence River demanded speedy action in case any disagreement arose among board members. During the hearings on this board Commissioner Magrath (Canada) said that the only reason why the board members should apply to the Commission "would be a disagreement respecting the

²² Order *M. N. P. Co.*, p. 9 (1914).

²³ Order, *Algoma*, p. 8 (1914).

²⁴ Order, *St. Croix W. P. Co.*, p. 6 (1915).

²⁵ Order, *Sprague's Falls Mfg. Co.*, p. 6 (1916): see Commissioner Powell's remark in the St. Croix Power Co. Case; *Hearings*, p. 55; see *supra*, p. 126.

²⁶ Order, *St. Lawrence R. P. Co.* (Washington, 1922), pp. 37-38.

²⁷ *Ibid.*, p. 38; *Papers of the I. J. C.*, p. 81.

control of the works, the object being to protect navigation".²⁸

4. *From the limitations on the Commission powers:*

Finally, the fact has to be remembered that the Commission as a "creature of the two Governments" possesses only certain specific powers delegated to it by the High Contracting Parties; and therefore it would be bound to observe the principle that delegated powers cannot be delegated: "When a bare power or authority has been given to another, the latter cannot, in general, delegate that authority, or any part of it, to a third person for the obvious reason that the principal has relied upon the intelligence, skill and ability of his agent, and cannot have the same confidence in a stranger".²⁹ A delegation appears nevertheless possible where it is "given to the agent by express terms of substitution".³⁰ Applying these rules to the powers of the Commission under Article VIII of the treaty of 1909, the conclusion would be that it cannot delegate its powers, judicial as they are under that Article, to another body; therefore it has no powers to create boards of control. Moreover, under that Article the Commission possesses no executive or administrative powers. The function of the boards is essentially administrative in character; therefore the Commission cannot delegate a power which it does not itself possess. On the whole, therefore, the inference may be drawn that the Commission is not clothed with any power to create boards of control; it can only require that they be created.

While the above position appears admissible, it may not be regarded as definite until certain other factors also have been duly considered.

²⁸ *Hearings, St. Lawrence R. P. Co.*, 1922, p. 32.

²⁹ Bouvier, *Law Dictionary* (Library Edition), p. 285, under "Delegation."

³⁰ *Ibid.*; also *Hearings, St. Lawrence R. P. Co.* (1922), p. 32.

1. *The language of Article XII:*

Under this Article the Commission is given specific power to "employ engineers and clerical assistants from time to time as it may deem advisable", and the two governments have agreed that all reasonable and necessary joint expenses of the Commission, incurred by it, shall be paid in equal moieties "by them. So far all the boards required by the Commission consist of engineering experts; this fact would seem to indicate that the functions of control boards are fundamentally of an engineering character. Therefore if the Commission under Article VIII requires certain remedial and protective works which further require constant control and regulation through the agency of a board, may not that board be created by the Commission under Article XII, with certain rules and regulations declaratory of the board's conduct? The reasonableness and necessity for the creation of such a board may be implied, and in that event the governments may bear the "joint expenses" under Article XII.

2. *No delegation of powers:*

Even if the board is regarded as an administrative agency, for the creation of which the Commission may or may not possess the necessary power, the position may still be taken that no delegation of powers appears to be involved in setting up these agencies; for the Commission may be merely applying its additional power under Article XII for the best interests of the parties concerned and for the fulfillment of the object of the treaty as voiced in the preamble.

If on the other hand it is maintained that a creation of boards would involve a delegation of powers, it may be submitted that "sometimes such power" of delegation "is implied . . . when by the law such power is indispensable in order to accomplish the end proposed".³¹ In the case of the treaty "the end proposed" would be found in the pre-

³¹ Bouvier, *op. cit.*, p. 285; under "Delegation."

amble to be "to prevent disputes", and the purpose of creating the Commission itself was to serve as a means toward accomplishing that end. Moreover, the Commission pointed out in its opinion in the case of the Michigan Northern Power Company that the two governments "do not even recognize that they have any responsibility in the premises beyond the power they have given to the commission to protect the interests on the other side of the line by suitable provisions placed in its order for that purpose".³² As regards the exercise of this power to impose suitable provisions, the Commission held that "there are no limitations whatever, except the judgment of the commission. . . . To hold otherwise would be to make this commission and its final decisions under the treaty, a source of international disputes rather than the instrumentality, as contemplated by the treaty, for the settlement and prevention of controversies between these two countries".³³ Under these circumstances, if the Commission compellingly feels that a board of control should be created for the most efficient operation of certain remedial and protective works approved by it, may it not be considered that the necessary power towards accomplishing that end is implied in the powers given to the Commission?

Again, having given only certain judicial powers under Article VIII to the Commission, it would apparently seem unfair to the governments to conclude that they contemplated that the Commission should fulfil all the engineering and technical responsibilities which it was bound to face in several of the disputes already presented and several more that may yet be presented to it for judicial settlement. It is perhaps to meet this contingency that the Commission was given power to appoint engineers and clerical assistants under Article XII. Consequently, to accomplish the end proposed

³² Opinion, *M. N. P. C.*, p. 23.

³³ *Ibid.*, p. 22.

or implied, a certain degree of delegation would appear "indispensable", especially in view of the fact that never in the history of the Commission have its members constituted a body of technical or engineering experts exclusively.

3. *The responsibility of board members:*

Of the three boards of control³⁴ required and approved by the Commission under Article VIII, two,³⁵ ordered between 1914-1915, were required to appeal in the first instance to the governments in case of disagreement among board members and only through them to the Commission. But in the last board appointed, in 1922, in connection with the works of the St. Lawrence River Power Company, the board members were enjoined to refer any matter of difference among them to the Commission directly. This order was issued because of the need for speedy action in the interests of navigation.³⁶ But the question may nevertheless be asked whether the Commission could have ordered the board members to refer their differences to itself, if under the treaty, it had no power to create the board itself, no matter what contingency existed. The acquiescence on the part of the governments and parties involved in the case would seem to warrant the inference that the governments had intended when they negotiated the treaty of 1909 that the Commission should exercise such an authority over the boards.

Further, during the hearings on the application of the St. Lawrence River Power Company, Commissioner Gardner (U. S.) asked Senator Kellogg³⁷ whether the board of con-

³⁴ Cf. page 125, *supra*; (1) Michigan Northern Power Company and the Algoma Steel Corp., Ltd.; (2) St. Croix Water Power Co. and the Sprague's Falls Mfg. Co., Ltd.; (3) St. Lawrence River Power Company.

³⁵ Cf. pp. 125-128, *supra*; and (1) and (2) above.

³⁶ Cf. page 128, *supra*.

³⁷ American Member of the Permanent Court of International Justice at the Hague.

trol "if created, would be required to report to the Commission".³⁸ The Senator replied, "Why, certainly. If a board of control can be created it has to be done by this commission and under the authority that this commission now has. Of course, no consent of any officers of the two Governments can give authority to create any board of control over international waters without a treaty. Therefore, the sole power, I take it, to create any board of control is in this commission and the board should report to this commission and be entirely under the control of this commission, unless, of course, the two Governments enter into a treaty and wish to create a board of control outside of the commission."³⁹ Mr. Kellogg, however, apparently relaxed this position when Mr. Gardner further asked him if the "Commission would of its own volition have authority to appoint this board of control".⁴⁰ "I could not say", replied Mr. Kellogg, "not having examined that, but it proposes to do it here."⁴¹ But he reiterated that the "consent" of the officers of the two governments, then present before the Commission, could "give the commission no further authority than it has now".⁴²

Thus a possible opinion seems to prevail which would indicate that under the circumstances described above, the Commission perhaps possesses an implied authority to create boards of control in necessary cases, an authority which it has not as yet found reason to employ.

It should be of some interest in this connection to observe that when the Treaty and Protocol between Canada and the United States was concluded on February 24, 1925,⁴³ for the

³⁸ *Hearings, St. Lawrence R. P. Co.*, 1922, p. 19.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p. 20.

⁴² *Ibid.*

⁴³ See p. 87, *supra*; also see Appendix D; *A. J. I. L.*, vol. xix, pp. 128-133.

regulation of the levels of the Lake of the Woods, a board of control was provided for; the members of that board were to refer any matter of difference among them to the Commission, whose decision should be regarded as final.⁴⁴ It may also be pointed out that the Reclamation and Irrigation Officers of the United States and Canada respectively, who may be regarded as constituting a board for all practical purposes in connection with the apportionment of the waters of the St. Mary and Milk Rivers, under the terms of Article VI of the treaty of 1909, were also made responsible to the Commission in case of any disagreement among them. Briefly, all these different instances seem to indicate that the Governments are more and more recognizing the increasing usefulness and value of the boards of control, and the desirability of placing them directly, in express terms, under the judicial authority of the Commission.

C. Compensation

Another equally unsettled issue implied in the Commission's power to impose conditions on applicants by ordering suitable and adequate provisions for protection and indemnity, is whether or not it is competent, under Article VIII, to order indemnity or payment of damages arising from and proportionate to the extent of injury involved in any case. Ordering of constructions such as embankments, dams or other compensatory or protective structures might be adequate provisions in certain cases.¹ But in others, chiefly where the authorization of an obstruction leads to the raising of the level of the water and its flooding and submerging of riparian property, compensatory structures alone

⁴⁴ *Ibid.*

¹ For example: Watrous Island Boom Co.; Michigan Northern Power Co.; Algoma Steel Corporation, Ltd.; St. Croix River Power Co.; St. Lawrence River Power Commission, etc.

might not be suitable, and perhaps inadequate. In such cases, has the Commission the power to ascertain the extent of the damages incurred and to order the applicant to pay the same in good faith? So far no decision has been handed down by the Commission in which this power has been exercised. There are, however, certain cases where it has been discussed at length, and one single instance where it has been exercised indirectly.

1. In the joint case of the St. Croix River Power Company and the Sprague's Falls Manufacturing Company it was contended that the applicants had already built their dam on property belonging to the Province of New Brunswick without purchasing the land,² that that act was a trespass, and that therefore the applicants should be ordered to pay an annuity to the Province of New Brunswick.³ The applicants on the other hand submitted that they had acquired the property rights in question and that they were "the absolute owners".⁴ Commissioner Powell therefore requested counsel of all parties to consider how the question of indemnity could be settled,⁵ although he later expressed a doubt as to how the Province of New Brunswick would be able "to get an annuity payable to the Government where the proprietary right" is in the applicants.⁶ "If the Government of New Brunswick is the proprietor", he added, "of the bed of that stream [the St. Croix River], and these people are not, then *we must award damages* to the New Brunswick Government. If this company is, we do not award damages to anybody."⁷ This remark of

² *Hearings, St. Cr. R. P. Co.*, p. 103; see Mr. Baxter's position.

³ *Ibid.*, p. 131, Mr. White.

⁴ *Ibid.*, p. 107, Mr. Tilly.

⁵ *Ibid.*, p. 67.

⁶ *Ibid.*, p. 131.

⁷ *Ibid.*, p. 132. Italics inserted.

Commissioner Powell's, that the Commission "must award damages", appears important in spite of the contention of counsel for the applicant that the provision in Article VIII governing "protection and indemnity" "does not contemplate your [the commission's] compensating for land that is actually expropriated, by way of fixing a price."⁸

2. In the case of the Michigan Northern Power Company, counsel for the Chicago, St. Paul and Minneapolis Railway Company⁹ submitted that he was not quite sure on the point "whether or not the jurisdiction of this commission relative to the determination of damages is conclusively concurrent or final".¹⁰ A similar position was taken by counsel representing the Northern Pacific Railway Company and the Great Northern Railway Company.¹¹ Consequently both these representatives sought the consent of the Commission "to reserve" on behalf of their clients "the right to object to the jurisdiction of the commission in this regard and to present evidence as to damage before this commission at an adjourned hearing without prejudice to our right by reason thereof".¹² Counsel for the Northwestern Pacific Railway Company added: "We came up here expecting to present figures that were somewhat startling on the question of damages, and the amount was so great that we did not want to be put to the peril of guessing as to these legal questions; so we wanted to reserve our rights in the proceeding."¹³ When however the Commission ordered its approval of the application, it did not refer

⁸ *Ibid.*, p. 181, Mr. Tilly.

⁹ Mr. Kennedy also represented the Northwestern Fuel Co. and the Clarkson Coal & Dock Co.

¹⁰ *Hearings, M. N. P. Co.*, p. 82.

¹¹ *Ibid.*, pp. 82-83, Mr. Lyons.

¹² *Ibid.*, p. 82, Mr. Kennedy.

¹³ *Ibid.*, p. 83.

to the question of any damages because, according to the opinion in that case, "both Governments and all of the parties" agreed that

if the construction and diversion is effected as proposed, and if the compensating works for that purpose are constructed according to the approved plans and agreed conditions, and they are then properly and efficiently operated, they will not alone compensate for the diversion, but will also make it possible to regulate the levels of Lake Superior within a more restricted range of levels than is now possible under the existing discharge capacity of the outlet of said lake.¹⁴

In the case of the New Brunswick Electric Power Commission, the question of damages and the power of the Commission to ascertain them were far more vividly and emphatically argued than in any other case prior to 1925. In this case a governmental agency, the New Brunswick Electric Power Commission (Canada) prayed for approval of plans of certain permanent works for the development of hydro-electric power in and adjacent to the channel of the River St. John at Grand Falls in the Province of New Brunswick. The applicant admitted that the proposed works would raise the level of the river and submerge eight hundred acres of land, equally situate on the two sides of the international boundary.¹⁵ Injury was inevitable to several interests, chiefly railroad companies, on both sides of the line.

When the case came up for hearings, counsel for the Canadian National Railways submitted that several culverts belonging to his clients would be submerged and that there-

¹⁴ Opinion, *M. N. P. Co.*, p. 13; also see remark of Counsel Thompson for Canada in *R. R. Imp. Co. Case, Hearings*, p. 96; also Commissioner Turner's remark in *G. W. W. District Case, Hearings*, p. 92.

¹⁵ Application, *N. B. E. P. Co.*, p. 9.

fore not only would they be compelled to either raise or enlarge such culverts, but also at one or two points to "rip-rap our right of way for certain distances . . . we have certain vested rights on the Canadian side . . . and we feel that any order you make should be made subject to" the protection of such rights.¹⁶ "It seems to me . . . that if you made it . . . a condition of your order that this protection should be given, that would be sufficient protection to ourselves."¹⁷

Counsel on behalf of the Canadian Pacific Railway pointed out that as a "Government body" the Electric Power Commission was "immune from certain proceedings" and therefore, to insure to his clients full enjoyment of their property and franchises, the applicant should enter into an agreement as regards the question of damages; he nevertheless insisted that the agreement should not be for the purpose of establishing "anticipatory damages", but for "damages as they actually occur";¹⁸ furthermore, such an agreement should form part of the order of approval to be issued by the Joint Commission.¹⁹

The Attorney General for the State of Maine argued before the Commission that "there is no real objection to the application, so long as the Commission provides for payment for all damages. . . ." ²⁰

Counsel for the Bangor and Aroostook Railroad said that his client company and its subsidiary, the Van Buren Bridge Company, as well as the "industries along the St. John river served by the Bangor & Aroostook, are all creatures of the state of Maine, all subjects of the United States",

¹⁶ *Hearings, N. B. E. P. Co.*, p. 22.

¹⁷ *Ibid.*, p. 24, Mr. Milligan.

¹⁸ *Ibid.*, p. 26, Mr. Wood.

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 31, Mr. Fellows.

while the applicant Power Commission "is an arm of the government of the province of New Brunswick. . . . I have not been able to ascertain the existence of any channel whereby we as citizens of the United States can go to the courts in the province of New Brunswick and procure an award of damages and collect them."²¹ So he suggested as a condition of approval that some responsible agency be made a citizen of the United States and thereby be made "suable in the courts of Maine".²²

Counsel representing the Province of New Brunswick told the Commission that the Government of the Province of New Brunswick was "willing to stand by what our commission [the Power Commission] will do, and we want to assure all concerned on either side of the river that whatever damage will be caused by this work will be compensated for and will be paid for according to the directions of this Commission [the International Joint Commission] which is supreme in the matter".²³

The Government of the United States represented through its assistant solicitor of the Department of State that: "We would like to have a provision incorporated in the order which will make it possible that all interests on the United States side of the boundary which may be adversely affected by the project shall be compensated, and provision made for the construction of any necessary protective works."²⁴

The attorney who represented the St. John Lumber Company submitted that his clients had a mill at Van Buren which by reason of the proposed development would be

²¹ *Ibid.*, p. 34, Mr. Hart.

²² *Ibid.*

²³ *Ibid.*, p. 44, Mr. Michaud.

²⁴ *Ibid.*, p. 66, Mr. Hackworth.

flooded. He therefore desired that "by some process or other an opportunity would be saved to us that for such damages as we do suffer we may receive adequate compensation by some properly constituted tribunal".²⁵ He added however that "if the Commission is going to make a provision in its order for assessment of damages, that would be entirely acceptable to me; just so long as there is some reasonable, adequate and secure way in which we can be protected in case it should develop that we would suffer any injury".²⁶

Thus almost all the parties involved in the case unanimously agreed that each of them in turn had no objection to the application, provided adequate means were available for the assessment of damages which their respective clients were likely to be subjected to as a result of the flooding and submerging of lands where they had certain riparian or other rights of ownership.

But then the question was whether or not the Commission had the necessary powers to assess damages in the case. Commissioner Powell therefore asked the several counsel in turn whether they had "given any thought to the question as to the jurisdiction of this Commission to exercise the power of a court in assessing damages in the event of failure of agreement between the parties".²⁷

The attorney for the St. John Lumber Company submitted that "from a very hurried reading of the treaty I understand that you [the Commission] are to see that the people secure adequate compensation. Just how you would do that I do not know. I assume there must be some way of doing it."²⁸ Counsel for the International Paper Com-

²⁵ *Ibid.*, p. 83, Mr. Pierce.

²⁶ *Ibid.*, p. 84, Mr. Pierce.

²⁷ *Ibid.*, p. 86.

²⁸ *Ibid.*, p. 84, Mr. Pierce.

pany and the Grand Falls Company added that he really had nothing that he could "offer that would be of assistance".²⁹ Counsel for the Government of the United States said: "There would probably be no arbitrary method of assessing damages, but we can establish our standards and if we think it is reasonable we can contend for it."³⁰

Commissioner Powell himself later added that "there is one thing that should be settled definitely and that is, in case of the failure of the different interested parties to come to any agreement and you call upon us, we would then *exercise our functions and make the agreements ourselves*".³¹ Counsel for the applicant submitted that "if we fail to do so [to come to some agreement regarding the question of damages] then we shall have to ask this Commission to *exercise its powers if it has them under the treaty of fixing indemnity*".³² Thereupon Mr. Powell asked the counsel whether he had "looked into that matter".³³ Counsel Lafleur replied that he had, and after a lengthy argument on the question of proprietary rights that had to be compensated, entered upon the problem of the power of the Commission to assess damages. "My submission", said he, "is that under the provisions of Article VIII of the treaty that jurisdiction is conferred upon you. It seems to have been the intention of the treaty to create an international obligation, because . . . Article VIII requires you to see to it that suitable and adequate provision, approved by you, be made for the protection and indemnity of all interests on either side of the line, and we have the

²⁹ *Ibid.*, p. 86, Mr. Montgomery.

³⁰ *Ibid.*, p. 77, Mr. Hackworth.

³¹ *Ibid.*, p. 85. Italics inserted.

³² *Ibid.*, p. 87, Mr. Lafleur. Italics inserted.

³³ *Ibid.*

case of the natural level of the waters being raised. . . . In that case when the waters are raised in the adjoining State of Maine by reason of the backing up caused by the barrage or dam which is constructed in New Brunswick the treaty provides: 'the Commission shall require suitable and adequate provisions'." ³⁴ This "means that the indemnity must be approved by the Commission. . . . This necessarily involves that this tribunal should consider the amount of the indemnity that is required to satisfy the proprietary interests on the other side of the line. . . . I do not know whether you have ever come to the point of deciding the *modus operandi*, but it seems to me clear from the wording of the treaty that it is intended you should do it." ³⁵

This was practically an exhaustive commentary on what Mr. Lafleur's colleague, ³⁶ also counsel for the applicant, had submitted to the Commission during the hearings held at Van Buren, Maine. At this hearing the applicant's counsel, Mr. Lewin, emphatically submitted that, "*The tribunal for the adjudication of these damages and this compensation is your honorable Commission and none other.*" ³⁷ Nevertheless both he ³⁸ and Mr. Lafleur ³⁹ seem to have been under the impression that possibly the injured parties on the American side could sue the applicant in the Exchequer Court of Canada for damages. After the treaty of January 11, 1909, had been ratified, the Government of the Dominion, in accordance with the requisites of Article III of that treaty, enacted necessary legislation and rendered the

³⁴ He quoted Article viii, par. 6.

³⁵ *Ibid.*, pp. 92-94.

³⁶ *Ibid.*, pp. 38-39, Mr. Lewin.

³⁷ *Ibid.* Italics inserted.

³⁸ *Ibid.*, p. 39.

³⁹ *Ibid.*, pp. 94-95.

Exchequer Court of Canada the appropriate court having "jurisdiction at the suit of any injured party or person claiming under this act in all cases in which it is sought to enforce or determine as against any person, any right or obligation arising or claimed under or by virtue of this act".⁴⁰ In view of this enactment, Mr. Lafleur held that the applicant, although "an arm of the Provincial Government", could still be "sued with the assent of the Attorney-General",⁴¹ in the Exchequer Court.

This position, however, was disputed by counsel for the United States. Mr. Hackworth said that,

it is true that Article II provides that people injured on one side or the other may have a remedy in the local courts. But that article is not applicable to this case. That article has to do with waters *flowing into* the boundary waters; and if in the State of Maine there should be constructed a dam in one of the tributaries of the St. John which should adversely affect the people in Canada, this article would come into play and they would have a right in our courts. If the converse situation should exist then we would have the right over there, but that has to do with waters flowing into boundary waters. This is not such a case. It is the backing up of waters flowing out of the boundary water. . . .⁴²

On these grounds therefore Mr. Hackworth submitted that whatever may have been the intention of the legislators of the Province of New Brunswick, it could hardly be seriously contended that the people in the State of Maine or in the United States would have to go over there to seek their remedy in a local court when this Commission has been established to give them protection and indemnity.

⁴⁰ Section 4, Act of 1911 (Canada), 1-2 Geo. V, chap. 28.

⁴¹ *Hearings, ibid.*, p. 94.

⁴² *Ibid.*, pp. 112-113. Italics inserted.

It is my well-considered view that your Commission should not give its approval to any order until the remedy in protection may have been adequately provided for to the satisfaction of your Commission, not to the satisfaction of some tribunal in Canada or the United States. *It is for you to determine whether the indemnity is sufficient* and whether the protection is sufficient; *it is not to be left to some local tribunal.* The only case in which a local tribunal has jurisdiction under this treaty arises under Article II, which has to do with waters flowing into boundary waters.⁴³

It does not, however, appear that the availability of local courts was applicable only to cases involving waters flowing into the boundary waters according to the provisions of Article II. There it is provided, after reserving the exclusive jurisdiction over "*all waters* on its own side of the line which in their natural channels would *flow across* the boundary or *into boundary waters*", that "*any interference with or diversion from their natural channel of such waters* on either side of the boundary, resulting in any injury on the other side of the boundary",⁴⁴ might lead to action in the respective local courts of the United States or Canada, as if the injury occurred just within that jurisdiction where the diversion or interference itself occurred.⁴⁵ This provision in Article II would seem to imply that not only in "*waters flowing into the boundary waters*", as counsel for the United States maintained, but also in *waters flowing across the boundary*, the local courts, and in Canada the Exchequer Court, might exercise the necessary jurisdiction. If the River St. John is regarded as a river flowing across the boundary, then it appears possible to hold that American interests may seek redress for injury in the Exchequer

⁴³ *Hearings, ibid.*, p. 113. Italics inserted.

⁴⁴ Article ii. Italics inserted.

⁴⁵ *Ibid.*

Court as well as before the Commission under Article IV. To that extent therefore the contention of the applicant's counsel in this case would appear warranted. But if the obstruction proposed is regarded as taking place in that section of the River St. John which flows out of the international boundary section of the same river, then Counsel Hackworth's position also would appear tenable; because in his argument on the case he submitted that the question before the Commission was "the backing up of water *flowing out of the boundary water*",⁴⁶ in which event the Exchequer Court, or any local court, would not be available to offer remedy and redress to the injured parties on the American side, because waters "flowing from the boundary waters" are not provided for in Article II, but only in Article IV.

Before the case of the New Brunswick Power Commission had reached the final hearings, the several parties involved had concluded certain agreements with the Electric Power Commission regarding the question of damages. In the one with the St. John Lumber Company, the Power Commission agreed that "it will pay the lumber company all damages which it shall suffer of whatsoever name, nature and description due to the raising and maintaining of the level of the St. John river . . .",⁴⁷ and the Lumber Company in turn agreed that it conceded the Power Commission "the right to maintain its dam and works . . . and to flow such of its property" as specified in the plans "filed with the International Joint Commission".⁴⁸ Similar agreements were entered into between the Power Commission and divers other concerns⁴⁹ involved in the question of damages.⁵⁰

⁴⁶ *Hearings, ibid.*, p. 113. Italics inserted.

⁴⁷ *Hearings, ibid.*, pp. 174-176, Schedule A.

⁴⁸ *Ibid.*, p. 176.

⁴⁹ *Ibid.*, Schedule B.

⁵⁰ Sale Agreement, *ibid.*, pp. 182-190.

The concluding of these agreements necessarily precluded the necessity on the part of the Commission to pronounce on the question of whether or not under the treaty it had the power to assess damages. It incorporated these agreements, however, as part of its order, and directed: "That the said Applicant carry out and perform all its obligations under the above recited agreements⁵¹ according to the tenor of such agreements."⁵²

Later the St. John River Power Company succeeded to the rights and obligations of the Power Commission and after application to the Joint Commission, obtained approval of its works. This approval also involved several agreements on damages with various concerns.⁵³

From these applications and approval it appears evident that the Commission may require the Parties to come to terms on questions of damages and incorporate such terms as part of its own order; but whether the Commission can, upon its own initiative, assess damages as a court does, cannot be ascertained until a specific case arises.

D. *Continuity of Jurisdiction*

The above discussion on the question of the Commission's powers under the treaty to require suitable and adequate provisions, raises one other important problem for further consideration. If the Commission has the power to require boards of control in appropriate cases to regulate the remedial or protective works approved by the Commission, has it also the final authority and control over such boards? Does the mere act of issuing an order in any given case place the Commission *quantum sufficit*?

⁵¹ *Ibid.*, Schedule B.

⁵² Order, *ibid.*, p. 3.

⁵³ See Agreements, *St. John R. P. Co., Hearings*, pp. 87-93; 94-95; 96-97; Order of Approval, p. 2.

During the joint hearings in the cases of the Michigan Northern Power Company and the Algoma Steel Corporation, Ltd., the question arose whether when once an order has been issued, the Commission's responsibility in the premises had ceased, in respect to the subject matter of those applications. Judge Koonce, appearing on behalf of the Government of the United States, maintained that after the Commission had given its "order of approval then it is up to the two Governments to see that it is carried out, and it is up to them to make regulations for the control of those works and for carrying out of your [the Commission's] order".¹ He insisted that under the law and under the powers the Commission has, the Commission could "simply recommend" to the two Governments the establishment of the necessary regulations for the operation of the works. Apart from doing so, there was "no final jurisdiction as far as the operation is concerned".² Operations go on from year to year and "will be necessarily affected by conditions that arise; and that is something that must necessarily be taken out of your [the Commission's] hands at some point and placed in the hands of the representatives of the respective Governments".³ At a later stage, he further held that

I am convinced that the commission should hold that its *jurisdiction is not a continuing one* in the sense that it may retain a supervisory or administrative control over this project, but whatever the form of your approval, . . . it should be definite, complete, final; and when you have completed your action you will have done all that you are required to do. In my judgment you should hold that you are charged with no further duty or responsibility, that you are clothed with no further power with respect to this particular proposition unless it should be again

¹ *Hearings, M. N. P. Co. and Algoma*, p. 227.

² *Ibid.*, pp. 86-87.

³ *Ibid.*, p. 87.

placed before you or your consideration is again sought in a proper and lawful way. . . . I do not think that it [the Commission] has any administrative functions, certainly it has no power of an executive character. . . . In fine, it is an instrumentality for ascertaining, fixing, and expressing international purposes concerning the things with which it has to do, but it is not an arm for executing the international will.⁴

When this forceful denial of the Commission's powers, to continue or retain jurisdiction after it has once issued its order of approval, had been submitted to the Commission, there appeared to be a certain degree of divergence of opinion. Commissioner Glenn (U. S.) demurred to the position held by Judge Koonce, and remarked, "I do not know how the rest of the court feel about it, but I think we have final jurisdiction."⁵ Commissioner Tawney (U. S.), acting as the chairman of the session, later added that "if in the judgment of the commission it is necessary to retain control over the operation of these works for the purpose of protecting the interests, it seems to me that it would be entirely competent for the commission to do so";⁶ while Commissioner Powell understood Judge Koonce to say that the order of the Commission "places us [the Commissioners] *quantum sufficit*,"⁷ although it is not possible to say that Mr. Powell held this opinion on the question.

Consequently when the time came for the Commission to deliver its decisions in the cases, it had to face two definite issues: first, what powers were vested in the Commission with respect to the provisions it was competent to order under Article VIII, and second, could the Commission's duty be regarded as fully carried out when once it has ordered what

⁴ *Ibid.*, pp. 229-231, also pp. 86-87. Italics inserted.

⁵ *Ibid.*, p. 87.

⁶ *Ibid.*, p. 227.

⁷ *Ibid.*, p. 227.

it then required, regarded and approved as suitable and adequate provisions, leaving thereby the rest to the Governments concerned? Could the two Governments, in the event of need, order the reconstruction of any of these works "which in the first instance neither Government had the power to do without the approval of this Commission".⁸

These questions were tackled by the Commission in its opinion in the case of the Michigan Northern Power Company. There it was held that:

The power of the commission under the treaty, to reserve as a condition of its order the right to hereafter, on application, modify such order in any manner found to be necessary to make the works of the applicant fully adequate for all the purposes they were originally intended, is so obvious from the language of the treaty, that if this power were questioned by anyone other than by one of the High Contracting Parties, it would not call for serious consideration.

This power is not only conferred by the treaty, but its existence is a necessary concomitant to the carrying out of the true intent and purpose of the treaty in respect to the prevention and settlement of disputes between the two Governments and their people regarding the use of the boundary waters. Without this power to approve conditionally, in cases where the proposed obstructions and diversions affect the rights and interests of the people on the other side, the purpose of the treaty would entirely fail.⁹ Further if the works in question proved inadequate (and both Governments manifest doubt as to their ultimate adequacy),¹⁰ injury on the other side would follow. In that case these works would have to be altered. The nature of these alterations and the manner in which they should be made would, under these circumstances, lead almost inevitably to differences, to settle which it might be necessary to again invoke the juris-

⁸ Opinion, *M. N. P. Co.*, p. 20.

⁹ *Ibid.*

¹⁰ Cf. Opinion, *Algoma*, p. 23.

diction of this commission. In holding, therefore, that *the Commission has the power under the treaty to retain jurisdiction* for the purposes above stated, we are at the same time exercising that power in harmony with the intent and purpose of the treaty . . .¹¹,

and therefore where there is obvious need to retain jurisdiction over works already approved, "to the end that such jurisdiction may at any time thereafter be invoked" for redress and remedy, "it is the duty, as well as the responsibility, of the Commission to do so, and for this purpose full power is conferred by the treaty".¹² This opinion was written by Commissioner Tawney (U. S.) and delivered on the 25th of May, 1914; and it voiced the unanimous opinion of the Commission.

The opinion in the Algoma Steel Corporation case, however, was not pronounced simultaneously with that of the Michigan Northern Power Company, although as already shown, both the cases were jointly heard by the Commission. It was delivered two days later by Commissioner Casgrain (Canada). He held, speaking on the point of continuity of the Commission's jurisdiction, that

I am of opinion that *our functions in such a case as the present one do not cease with the decisions to be rendered by us*. If it were so, the services which we are called upon to render to both countries might be nugatory and without practical effect. The commission is in existence, and if denounced can only be terminated at the expiry of one year from the date on which it is denounced.¹³ Even taking the extraordinary view that the treaty might be denounced, the high contracting parties, according to its terms, would have one year within which they could come to some understanding to replace the machinery settled

¹¹ Opinion, *M. N. P. Co.*, pp. 22-23. Italics inserted.

¹² *Ibid.*, p. 23.

¹³ Article xiv; italics inserted.

upon by the commission in the course of its decisions, but we must adjudicate upon these questions which come before us with the treaty under our eyes, as an existing fact leaving to the high contracting parties the responsibility, in case of necessity, or providing other means by which the decisions or findings of the commission may be carried out to the advantage of both. *There is nothing in the treaty which says that once we have approved of remedial or protective works, the commission, in respect of these works, is functus officio.* The matter having been submitted to us, having been studied with all the care and attention which it requires, and the particular means provided by the treaty to ascertain the true state of facts and the exact condition of things having been taken, it is for the commission to say whether it approves, once for all, what provision shall be taken for the protection of the interests involved, or whether this provision, from the nature of things, having proved unsuitable and inadequate, the parties may not be at liberty to return before the commission, point out the inadequacy or insufficiency of the means employed, and obtain further order, if necessary.¹⁴ In case either the regulations themselves or the works approved, did not prove to be suitable and adequate provision for the protection of the interests involved, *either of the Governments or any interested party could apply directly to the commission for a change in the regulations or in the works.*¹⁵

Apart from these two opinions which testify to the fact that when necessary the Commission retains jurisdiction over the works it has already ordered, thus keeping its jurisdiction continuous, there are several orders of approval which bear on the same position either directly or indirectly.

In the Order of the St. Lawrence River Power Company, the Commission held that "for the purpose of protecting the rights, property and interests on the other side of the boundary from any injurious effect resulting from the construction

¹⁴ Opinion, *Algoma*, p. 23. Italics inserted.

¹⁵ *Ibid.*, p. 24. Italics inserted.

and maintenance of said weir *the Commission will*, during the term of its approval¹⁶ herein, *retain jurisdiction* over the subject matter of said application, and may make such further order or orders in the premises as may be necessary".¹⁷

In the Order issued to the Greater Winnipeg Water District for the diversion of the waters of Shoal Lake and the Lake of the Woods, the Commission provided that: "The present approval and permission shall in no way interfere with or prejudice the rights, if any, of any person, corporation, or municipality to damages or compensation for any injuries due in whole or in part to the diversion permitted and approved of . . ." ¹⁸

The provision in the Order of Approval given to the International Lumber Company reads that: "In case of any duly authorized obstruction on the Canadian side of the river, [Rainy River] opposite the said boom and sorting gaps, which would, when completed, be of such extent as to require, in the judgment of the commission, the removal of said boom and sorting gaps, the company shall remove the same southerly from the boundary to such a distance as the commission may direct." ¹⁹

In the Orders respectively issued to the New Brunswick Electric Power Commission,²⁰ and to the St. John River Power Company,²¹ which succeeded in title to the works of the former Power Commission, the provision was incorporated that the "Commission doth hereby reserve to the Applicant and to all the parties having claims for injuries in

¹⁶ 5 years.

¹⁷ Interim Order, *St. Lawrence R. P. Co.*, p. 6. Italics inserted.

¹⁸ Order, *G. W. W. District*, p. 22.

¹⁹ Order, *I. L. C.*, p. 7.

²⁰ Order, *N. B. E. P. Com.*, p. 3.

²¹ Order, *St. John R. P. Co.*, p. 4.

respect of said works other than the parties to said agreement the right to apply for such further order, direction or action with reference to such claims as may seem proper ”.

A similar clause was inserted in the Order of Approval granted to the Creston Reclamation Company, Ltd.²² Thus a series of provisions, whether in opinions or in orders of approval, has reserved to the proper parties their right to institute necessary proceedings before the Commission, in the event that any works, required and approved by the Commission as suitable and adequate provisions, later prove subversive of their expected purposes and inflict unwarranted injury. In reserving this right permitting access to the Commission at any subsequent period to redress an injury even after an order of approval has been granted, the Commission, it appears, has established for itself a continuity of its jurisdiction over the works or their regulations.

Further, there is one other point that may be advanced in support of the above position, which arises from the relation of the boards of control to the Commission. During the hearings as regards the board that was set up to control the works of the Michigan Northern Power Company and the Algoma Steel Corporation, Ltd., the question arose whether or not, in the event of a disagreement between the two members who composed the board, upon any matter, it should be submitted to the Commission for settlement. “The Government engineers, with the engineers representing the applicants,” suggested to the commission that in the event of such disagreement, “the question at issue, upon the application of either Government, shall be referred to this commission for its recommendation ”.²³ The Commission demurred to this position and maintained as its opinion that,

²² Order, *Creston R. Co.*, p. 2.

²³ Opinion, *Algoma*, pp. 16-18; Section 20, p. 18.

In view of the purposes for which such questions are to be referred it is the judgment of the commission that they should be referred for *decision* rather than for *recommendation*. Such questions could relate only to the maintenance or operation of the works. They could arise only in connection with the execution of the order of approval. If, as the Governments concede, the commission has the power to impose, as a condition of its order, the reference of these questions to it for recommendation, *it certainly has the power to make that condition a reference for a decision*. It is obvious that these questions of difference [among the members of the board] would not be comparable in importance to the many questions which, under the treaty, the commission is authorized to decide. The nature and importance of these questions are not relevant therefore to the question of the power of the commission to reserve as a condition of its order the decision of these questions.²⁴

Upon this presumption the Commission ordered: "In the event of a disagreement between the members of said board, in respect of anything required of said board herein or in respect to the duties or powers of said board or as to the exercise of such duties or powers, the question at issue shall, upon the application of either Government, be referred to this commission for its decision."²⁵ A like provision was established in connection with the second board the Commission ordered, to control and regulate the works of the St. Croix River Power Company and the Sprague's Falls Manufacturing Company.²⁶

In the case of the St. Lawrence River Power Company, the Commission established a slightly different rule. In the above cases, any matter of disagreement between the board members could reach the Commission for its decision, only "upon the application of either Government". The board

²⁴ Opinion, *M. N. P. Co.*, pp. 16-17. Italics inserted.

²⁵ Order, *M. N. P. Co.*, p. 9, sec. 17; Order, *Algoma*, p. 10, sec. 17.

²⁶ Order, *St. Croix W. P. Co.*, p. 6, sec. 10; Order, *S. F. Mfg. Co.*

members themselves could not directly approach the Commission to have their differences settled. In the case of the last board, for the regulation of the works of the St. Lawrence Power Company, it was provided that the board "shall have the right to apply in any circumstances where deemed necessary and advisable".²⁷ to the Commission. This provision for direct access was made as has already been pointed out elsewhere, because of the particular circumstances that attended the nature of the application as well as the situation on the St. Lawrence River.²⁸

Nevertheless the fact to be observed here is that matters of disagreement between board members are to be referred, at least under certain circumstances, to the Commission for its decision. This power of decision which the Commission has already established seems further to clothe its jurisdiction with a character of continuity. In fact, therefore, there exists a continuity of jurisdiction not only in respect of the various compensating works which the Commission might have ordered, but also in relation to the Boards designed to control and look after such regulatory works. In other words, when once an order has been issued by the Commission requiring certain provisions in the nature of remedial or protective works which call for a control board to regulate them, the Commission does not at all become *functus officio* in respect of such works; on the contrary it retains jurisdiction over such works in order to meet the ends of justice and equity, and thereby fulfil the aspirations of the treaty.²⁹ It is this aspect of the Commission's power that clothes its jurisdiction with a character of continuity.

²⁷ Order, *St. Lawrence R. P. Co.*, par. 3, p. 38.

²⁸ *Hearings, St. Lawrence R. P. Co.*, p. 31 *et seq.*; *Papers of the I. J. C.*, p. 81.

²⁹ Opinion, *Algoma*, pp. 16-18.

E. *The Law Applied by the Commission.*

The Commission has been frequently and with reason referred to as an international court, or as Commissioner Tawney once remarked, "a local international judicial tribunal . . . clothed with final jurisdiction in all cases arising under Articles III and IV . . ." ¹. This remark would suggest that the Commission expounds the law laid down by the treaty of 1909. Consequently any action taken by the Commission beyond the terms of the treaty would be, as the Commission itself has held, "*coram non judice* and void. It would bind neither government." ²

A survey of all the cases decided by the Commission clearly shows that in no instance whatever has it exceeded the powers conferred upon it by the treaty. In its endeavor to apply the treaty, nevertheless, it has often confronted problems for which the treaty has not provided any specific solution. It is therefore of some interest to inquire what rules the Commission has followed in handling such problems insofar as they involved either principles of international law or questions of private rights.

The Commission and International Law

The Thalweg

While the case of the Watrous Island Boom Company ³ was being heard regarding the construction of a boom in the Rainy River, Counsel Thompson, appearing on behalf of the Canadian Department of Public Works, submitted that it was "somewhat difficult to formulate our objections speci-

¹ Address at the Canadian Club, Ottawa, Oct. 6, 1915.

² Opinion, *R. R. I. Co.*, p. 7. The phrase implies "acts done by court which has no jurisdiction either over the person, the cause, or the process are said to be *coram non judice*. . . Such acts have no validity." Bouvier, *Law Dictionary* (Library Edition), p. 236.

³ See case elsewhere, pp. 110, 352 *et seq.*

fically, because . . . the international boundary line in this river has not yet been determined, and until that has been done . . . it is impossible to say which part of this boom is in Canada and which part is in the United States".⁴ Commissioner Streeter (U. S.) thereupon asked the counsel what was "the general view as to where the international boundary line is in the river? Is it in the center of the river or in the center of the navigable channel?"⁵ Mr. Thompson replied that he was "proceeding on the assumption that it is in the center of the river". He seems to have arrived at this assumption upon the strength of a letter, which he subsequently introduced in evidence, written by Mr. W. F. King, the Chief Astronomer of Canada, to Mr. Chapleau, Engineer of the Department of Public Works, in reply to his inquiry "as to the definition of the boundary line in Rainy River, whether it follows the line midway between the banks or the middle of the channel".⁶ The Chief Astronomer had replied that "the description by the commissioners under the seventh article of the treaty of Ghent appears to point to the former [i. e. the line midway between the banks] as the correct definition, though the charts accompanying the description might possibly be held to constitute therefor the arbitrary line drawn by the commissioners along the river".⁷ "The matter", he continued in his reply, "has not yet been the subject of a formal decision by our commission. I have written to the United States commissioner asking to agree to a formal definition, but have not yet had a reply."⁸ Mr. Thompson's reply seems to have been actuated by this correspondence between Messrs. Chapleau and King. But

⁴ *Hearings, W. I. B. Co.*, p. 44.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*, p. 45.

⁸ *Ibid.*

Commissioner Powell asked Counsel Thompson, before the latter had submitted the letter in evidence, whether or not the treaty of 1909 said "anything" about the question of the boundary in the Rainy River.⁹ Mr. Thompson submitted, "I think not, sir." Thereupon the Commissioner said that "in the absence of the treaty the international law says the center of the channel".¹⁰

When eventually the decision was handed down in this case the Commission did not find it necessary to pass upon the question of the boundary line, because it was satisfied that "whether the international boundary follows the center of the stream or the center of the channel, the boom is almost completely built in American territory".¹¹

The Commission and Private Rights

I. The Algoma Steel Corporation, Ltd.

During the hearings on the application of the Algoma Steel Corporation, Ltd.,¹² for the obstruction and diversion of waters of the St. Mary's River and the construction of certain compensating works at Sault Ste. Marie, Ontario, the question was raised by Counsel Staunton for the Province of Ontario whether or not the applicant had the necessary right to divert the water at the point suggested. "The fee in the bed of the stream is in the Province", said he, "or the ownership is in the Province. . . . The Province has the ownership of public lands."¹³ The applicant should "go to the Province and get the right to use the water and to use the land in front of it. If he got your [the Commission's]

⁹ *Ibid.*, p. 44.

¹⁰ *Ibid.*

¹¹ Order, *ibid.*, p. 16.

¹² See Docket no. viii; *Hearings*, together with the Michigan Northern Power Co.

¹³ *Hearings, Algoma and M. N. P. Co.*, p. 129.

approval and got the Dominion's approval he has not advanced the distance he wishes to go, because he must get our approval afterwards." ¹⁴ In brief, the counsel's argument involved a question of property rights which, it was alleged, the applicant did not possess at the time of the application to the Commission.

The Commission however heard all the necessary evidence in the case and issued an order of approval. In a succinct opinion by Commissioner Casgrain (Canada) the Commission held,

Some question was raised during the argument as to the right of this applicant, in view of the position taken by the Ontario Government, to take the water which belongs to the Province and build upon the land which is also in the provincial domain. *With that question we have nothing to do.* The applicant comes before us with plans approved by the Government of the Dominion and asks us under the treaty to approve of the diversion and obstruction which it contemplates. . . .¹⁵ This does not mean, however, that a party may appear before the Commission and by obtaining an order of approval of its plans, in the case of a diversion or obstruction, take the land of another without conforming to the common law of the country. So in the present instance, before the applicant can use the approval which it obtains from this Commission, it will, if necessity of the case arise, be obliged to treat and settle with those whose property right it encroaches upon.¹⁶

Otherwise the applicant "could not avail himself of the permission granted".¹⁷

¹⁴ *Ibid.*, Mr. Staunton.

¹⁵ Opinion, *Algoma*, p. 21. Italics inserted.

¹⁶ *Ibid.*, p. 22.

¹⁷ *Ibid.*

2. St. Croix Water Power Company

Another interesting case involving questions of title arose when the Commission was called upon to approve of the joint project of a dam already built by the St. Croix Water Power Company (on the American side) and the Sprague's Falls Manufacturing Company, Ltd., (on the Canadian side) at Grand Falls in the St. Croix River, between the State of Maine and the Province of New Brunswick. The dam had been built by the two companies, acting in "good faith" that no other authority was required for the construction than that conferred by the acts of incorporation,¹⁸ which they had obtained from their respective governments.

When the application had been filed and the case brought on for hearings, the Province of New Brunswick entered its objection against the application. Counsel Baxter, appearing on behalf of the Province, submitted that:

The position of the Province of New Brunswick is simply this: that under the law of New Brunswick, as enunciated by the Supreme Court of Canada, the applicant company is maintaining one-half or two-thirds of its dam upon land which is not the property of the Company, but which is absolutely the property of the Province of New Brunswick, for which the Province has not been compensated, and with respect to which the Province of New Brunswick has never been asked to grant any rights. . . .¹⁹ In the Province of New Brunswick there has been no decision involving the right to the land from the middle thread of the river to the boundary of the grant or to the bank of the river.²⁰

Against this position Counsel Tilly maintained that:

¹⁸ *Hearings, St. Croix W. P. Co.*, p. 10; chap. 203, Acts of 1899 (Maine); *Hearings*, Appendix, p. 187, 2 Edward vii, chap. 103; also see Order of Approval, *S. F. Mfg. Co., Ltd.*, p. 3.

¹⁹ *Hearings, St. Croix W. P. Co.*, p. 97.

²⁰ *Ibid.*

"Every kind of property in Canada is owned either by the Crown or private individuals."²¹ He then adduced the case²² of Attorney General of New Brunswick *v.* the Attorney General for Canada to substantiate his position that the grant of land made by the Crown to his clients carried with it the title to the middle of the river and therefore to the bed.

When the Crown by this treaty [1909] reserves any right or provides any protection for property along that river it provides it for the Crown, if it remains the owner. It provides it for the patentee if the Crown has conveyed it away; so that if our contention is right with regard to our title to this property on which the dam is built, we are the Crown with regard to that piece of property. The rights protected with regard to it are for our benefit.²³

Mr. Tilly then proceeded to adduce the decisions in several cases to maintain his position that as riparian owners his clients had title to the bed of the river. These were all cases passed upon by the Privy Council.²⁴

These arguments of Counsel Tilly indicated clearly that he had proceeded on the assumption that the St. Croix is not a navigable river; if it were a navigable river, "the laws of the country [Canada] would require some attention to be sure that it [the dam] did not affect navigation". On the other hand, the St. Croix River is a navigable river according to

²¹ *Ibid.*, p. 154.

²² 1914 *Appeal Cases* 173.

²³ *Hearings, ibid.*, p. 155.

²⁴ *Ibid.*, p. 157; (1) Attorney General of Southern Nigeria *v.* Holt, 1915, *Appeal Cases* of the Privy Council. (2) City of London *v.* Central London Railway, 1913, *Appeal Cases* 364. (3) MacLaren *v.* Attorney General for Quebec, 1914, *Appeal Cases* 258. (4) Keewatin *v.* Kenora, 1913 Ontario Law Reports, 237.

the laws of the United States.²⁵ Consequently, during the hearings Commissioner Tawney remarked, "As a matter of fact under the laws of the United States these structures cannot be legal, obstructing the navigability of the river".²⁶

On this question of title to property, Judge Koonce for the War Department of the United States took what might be regarded as an appropriate view in so far as it concerned the power of the Commission. Counsel Koonce wanted to say "just a word regarding the legal status of these applicants from the point of view of their property rights".²⁷ But Commissioner Powell interposed, saying "I do not think it is worth while wasting time with that, because we have already decided that."²⁸ To this Mr. Koonce added, "I quite agree that it is not material, . . ."²⁹ I am glad to understand that you do not consider this material to your action, and I think you have decided wisely. The Commission cannot be expected to examine land titles, or to determine disputed questions of governmental grants; it is sufficient if applicants come, as they do in this case, with color of title, with a *prima facie* showing of authority."³⁰ To support this position Judge Koonce referred to the Opinion rendered by the Commission in the Algoma Steel Corporation case,³¹ where, as was shown above, Commissioner Casgrain held that with the question of title or right of the applicant to divert waters at

²⁵ "The United States Supreme Court has held that any stream on which logs can be floated periodically with commercial profit is navigable." Koonce, *Hearings, ibid.*, p. 117.

²⁶ *Ibid.*, p. 110.

²⁷ *Ibid.*, pp. 149-150; whether this was a reference to the decision in the Algoma Case or not, is not clear; presumably it does refer to that case. See *infra*, p. 166.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, p. 150.

the Soo, the Commission had "nothing to do".³² Even during the hearings in the case before the Commission in reply to the plea which Counsel Baxter for New Brunswick had made to the effect that the Commission should "hesitate and . . . wait until the applicant shows that it is in the position of having a rightful title",³³ Commissioner Powell had replied that "it is a matter outside of us altogether".³⁴

The Commission after adequate study of these questions issued its order of approval, in which it held that: "The applicants are the owners of the riparian lands on both sides of the said river which are affected by the change of the levels of the said river".³⁵ It did not say whether or not as riparians on the Canadian side the Sprague's Falls Company owned the bed of the river *ad medium flum*. "In the opinion of the Commission it is not necessary to pass judgment on these contentions."³⁶

3. The Michigan Northern Power Company

In the case of the Michigan Northern Power Company a question of that company's lease of property from the government of the United States through the War Department, for the use of a larger amount of water at the Soo than previously used by the company's predecessor in title,³⁷ was involved. In fact, the applicant had prayed that the Commission should give its order of approval of the lease itself. This prayer was not pressed however before the Commission, because the counsel for the applicant, Mr. Sears, later said that "from the reading of the treaty I take it that the com-

³² *Ibid.*; see Opinion, *Algoma*, p. 21.

³³ *Hearings, St. Croix W. P. Co. & S. F. Mfg. Co.*, p. 100.

³⁴ *Ibid.*

³⁵ Order, *ibid.*, p. 5.

³⁶ *Ibid.*, p. 9.

³⁷ *Hearings, M. N. P. Co.*, p. 11.

mission would hardly have much to say about the lease".³⁸ "I do not suppose it would be within the scope of the functions of this tribunal to pass on our lease. I do not suppose we could ask that, and probably that prayer in the original application was a misconception of the jurisdictional scope of this Court."³⁹ Consequently the matter of passing upon the lease was not pressed.

In the case of the New York and Ontario Power Company there were questions of property rights of the applicants involved which were disputed by the State of New York. In the first case brought in by the New York and Ontario Power Company, seeking the Commission's approval of the reconstruction and repair of a dam and certain hydraulic structures in Little River, at Waddington-on-the-St.-Lawrence, N. Y.,⁴⁰ the question arose whether the petitioner had title to the property involved. Counsel for the State of New York contended that the applicant's title "had expired"⁴¹; while the applicants argued that they "practically own all of these lands, and if we do not, we are in a position to acquire them by agreement. I do not know about this commission having authority for a condemnation."⁴² The State of New York, however, submitted a "memorandum" for the consideration of the Commission in which the State pointed out that "the Commission, by its decision, may not oust the State of New York from its rights, nor may it grant to the petitioner rights in property which it does not possess. But it is inconsistent with the question of title when the same is asserted and con-

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 12.

⁴⁰ *Hearings, N. Y. O. P. Co.*, p. 3.

⁴¹ *Ibid.*, p. 313; see McLean for New York, also see Statement in Response on behalf of the State of New York, p. 358; *Papers of the I. J. C.*, p. 134.

⁴² *Hearings*, p. 113.

troverted. It has, therefore, been deemed a proper duty to lay before your Commission the position of the State of New York with respect to the title of the lands in the bed of the Little River occupied or designed to be occupied by the petitioner." ⁴⁸ The Commission, however, did not have to pass upon these contentions since the case was adjourned indefinitely.

⁴⁸ *Ibid.*, p. 377; for memorandum, see pp. 365-377.

CHAPTER IV

TREATY INTERPRETATION

As an international tribunal the International Joint Commission has been often confronted with the problem of interpreting the treaty of 1909 in order either to establish its own jurisdiction under the terms of its reference, whenever that has been contested, or to ascertain the meaning of various provisions of that treaty involved in the several cases before it. The Commission faced this problem in the very first case that was presented to it.

I. THE RAINY RIVER IMPROVEMENT COMPANY CASE

On April 4, 1912, this company, located at International Falls, Minnesota, sought the approval of the Commission "for the construction, maintenance and operation of a dam across the Rainy River"¹ at a point where it formed the boundary near the outlet of Lake Namakan at Kettle Falls, St. Louis County, Minnesota.² During the hearings on the application it became evident that the applicant had obtained the necessary approval by virtue of a special enactment of the Congress of the United States, under date January 24, 1911, to carry out the proposed project in the United States waters.³ Meanwhile "the company under another name [the Ontario and Minnesota Power Co.,] in Canada", had procured "the authority from the provincial government [of Ontario] for the construction of the dam"⁴

¹ *Hearings, R. R. Imp. Co., Application*, p. 4.

² *Ibid.*

³ Public, no. 418; S. 10596; 36 Stat. 156; *Hearings*, p. 4.

⁴ *Hearings*, p. 13.

on the Canadian side. As proposed, therefore, the Rainy River Company's dam would go to the center of the stream, and the Ontario and Minnesota Power Company's dam also to the center, but from the other side, and the two would thus form one dam.⁵

In this case there were two important and interesting issues which called for an interpretation of the treaty at the hands of the Commission: (1) If the Congress of the United States has authorized the construction on the American side and the Ontario legislature on the Canadian, then has the Commission anything at all to do with the application? ⁶ Did the respective legislations on the two sides of the boundary constitute a "special agreement" under Articles III and XIII of the treaty of 1909, and thereby automatically disqualify the Commission from entertaining jurisdiction in the premises? (2) The *locus in quo* being an international water which, as alleged, under Article VII of the Webster-Ashburton Treaty of 1842 was to be kept "free and open" for the two contracting parties of that treaty, could the Commission authorize the construction of a dam in the water in question without violating the provision of the earlier treaty?

Commissioner Tawney (U. S.) felt that it was for the Commission to say whether "this is a case which comes within the jurisdiction of the Commission under this treaty",⁷ while Commissioner Turner (U. S.) was satisfied that they had "not a particle of jurisdiction to consider this application at all",⁸ because "under Article III of the treaty we have no jurisdiction except to consider obstructions on one side of the boundary waters, which affect the

⁵ *Ibid.*

⁶ *Hearings*, p. 39, p. 13.

⁷ *Ibid.*, p. 40.

⁸ *Ibid.*, p. 45.

level or flow on the other side". Moreover, if the applicant companies on the two sides of the line "finally get the legislative action and the approval of the two governments, that is perfect and complete in itself and it does not require any confirmation from us. True, it is not contemplated that there should be any obligation on our part to give or to withhold our approval." ⁹

The Articles involved in this Question

Articles II, III, and IV of the treaty of 1909 refer to what is called a "special agreement", and Article XIII defines it as follows:

Article XIII: ¹⁰

In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.

In view of the language of this Article and reference thereto in Article III, the Commission had to decide whether or not it could entertain jurisdiction in the case.

Position of Counsel

(a) Applicant's View

Counsel for the applicant submitted that:

The act of Congress stops at the boundary and the drawing of a picture clear across [i. e. across the entire river] does not

⁹ *Ibid.*

¹⁰ Treaty of 1909; Charles, *op. cit.*, pp. 39, 47; *Br. and For. State Papers*, vol. 102, p. 137; Martens, *N. R. G.*, series 3, vol. iv, p. 208; *U. S. Foreign Relations*, p. 533 *et seq.*, 1910, Washington, 1915.

affect the power of Congress any more than it involves the boundary of the United States. While it is true that this action by the two legislative bodies is reciprocal, in the sense that each one has acted, it is not reciprocal in the sense that one legislation refers to the other . . . the action of Congress is taken wholly in ignorance of the act of the Ontario legislature and the Dominion Parliament, and . . . Canada has acted without any reference to the action of Congress, . . . the two are independent. . . .¹¹

Counsel for the Canadian company (the Ontario and Minnesota Power Co.) entertained the belief that the case did not require the approval of the Commission.¹²

(b) Opponent's View

The Rainy River Lumber Company opposed the project of the applicant, through counsel,¹³ on the ground that a dam which would run "clear across the river" was excluded from the province of Article III, from which the Commission derived its jurisdiction.¹⁴ "It is not the kind of application that is provided for by the treaty."¹⁵ "There is no provision in this treaty for anything more than an obstruction, or dam on one side of the line."¹⁶ That was the "only thing" for the purpose of the Commission's jurisdiction.¹⁷ Consequently the application "has no status" before the Commission; moreover, it "recites the act of Congress", and the act of Congress "is plainly beyond the jurisdiction of the Congress", because the act

¹¹ *Hearings*, p. 48 (Mr. Rockwood).

¹² *Ibid.*, p. 49 (Mr. Osler).

¹³ *Ibid.* (Mr. Watson); p. 66 *et seq.*

¹⁴ *Ibid.*, p. 68.

¹⁵ *Ibid.*, p. 69.

¹⁶ *Ibid.*, p. 70.

¹⁷ *Ibid.*, pp. 71-73.

authorizes "the construction of a dam across the river from side to side. Congress had no power to pass such enactment. It never had."¹⁸

In this connection Commissioner Powell (Canada) expressed his view that "Canada has not completed the legislation at all. The statute says in accordance with plans to be approved by the board of public works. It has not given its approval, and apparently it is not going to. In view of that state of affairs, could we say that there was an agreement between these two powers?" The Counsel replied, "I think there is an absence of it."¹⁹ "In other words", added Mr. Powell, "it is not covered by Article XIII."²⁰ "Decidedly not", the Counsel stated emphatically. "There is no special agreement."²¹ "On that point then", inquired Commissioner Casgrain (Canada), "we would have jurisdiction . . . ?" Mr. Watson²² reiterated his position in reply, that there "is no concurrent jurisdiction, there is no reciprocal legislation, and there is no agreement for this proposed dam across the river".²³

Mr. Watson's colleague, Counsel Powell, took a slightly different view of the question. He also contested the jurisdiction of the Commission, while admitting that "legislation of such a character that everyone would assume that it had reference one to the other, and both relating to the same enterprise, would be unquestionably reciprocal".²⁴

¹⁸ *Ibid.*, p. 73.

¹⁹ *Ibid.*, p. 81.

²⁰ *Ibid.*, p. 82.

²¹ *Ibid.*

²² Counsel for the Rainy River Lumber Company.

²³ *Hearings*, pp. 82, 91.

²⁴ *Ibid.*, pp. 85, 91.

(c) The Dominion Government's View

The representative of the Dominion Government, Counsel Thompson, brought in an entirely new interpretation and construction of Articles III and XIII. "My contention is", said he, "that Article III refers to diversions, constructions, and uses by private individuals, and Article XIII to works of a public nature."²⁵ How the learned counsel arrived at this position is hard to appreciate, especially in view of the language of Article XIII, already cited. Article XIII explains what a "special agreement" is as referred to "in the foregoing articles", which are Articles II, III and IV. The only place in the treaty, therefore, to which one may resort to discover what may be comprehended by the term "special agreement" as employed in the three articles is, it is submitted, Article XIII. Articles II, III and IV do not in any sense discriminate between public and private works; nor does Article XIII contain any language upon which such a distinction could be based.

Mr. Thompson's position, however, on the question whether or not the case at hand was one of reciprocal legislation or concurrent jurisdiction was interesting. He agreed with the counsel of the Rainy River Improvement Company (the American agency) that there was no reciprocal action between the two governments, but he differed in his argument from the applicant's counsel in that the latter held that the Congress of the United States and the Ontario legislature had both acted, and that that "action by the two legislative bodies" was "reciprocal" although "there has never been any reciprocal action in any one of the acts with reference to the legislation on the other side".²⁶ Mr. Thompson, on the other hand, held that: "In the first

²⁵ *Ibid.*, p. 95.

²⁶ *Ibid.*, p. 48, Mr. Rockwood.

place the Ontario and Minnesota Power Company statute was passed in 1905, years before this treaty [1909] came into effect. The Rainy River Improvement Company bill before Congress was passed in 1911, six years afterwards. Now, sir, could that be said to be concurrent legislation?"²⁷

Thus when the various positions had been submitted by counsel on all sides, the Commission had to decide whether, under the provisions of the treaty whereby the Commission obtained its authority to act under appropriate circumstances, it could or could not entertain jurisdiction in this case.

(d) The Interpretation of the Commission

On April 8, 1913, the Commission delivered its decision, about a year after the filing of the application. Sections of the opinion in this case are worth noticing:

The Commission is in full possession of the fact that these two applications, one of which, the American application, was approved by the Secretary of War, and the other, the Canadian application, is before the Department of Public Works for approval, have a common object, viz., the building of a dam across the boundary waters at the point in question.²⁸ The purpose in view [of the application] is the obstruction of the whole river with the result that the natural level or flow of the waters will be affected on both sides.²⁹

In relation to jurisdiction

Turning to the question of the Commission's jurisdiction under the treaty, the opinion says:

It is proper to observe in this connection that an international Commission finds its authority to act, in the treaty creating it or in supplemental treaties defining its powers, and that any action

²⁷ *Ibid.*, p. 99.

²⁸ Opinion, p. 5.

²⁹ *Ibid.*, p. 6.

taken by it beyond the terms of the treaty, fairly construed, would be *coram non judice* and void. It would bind neither Government.³¹

The principles governing our interpretation of this treaty or international contract are no other or different than those now universally applied in the interpretation of all contracts and agreements whether between private individuals or public authorities. The principle is frequently expressed by the phrase, "the true interpretation of the terms of a contract is the ascertainment of the intention of the parties, determined by the weight of competent evidence."³²

The only evidence of the intention of the high contracting parties to be considered by us is the provisions of the treaty itself. From a careful examination of these provisions we are unable to find that the two Governments intended to confer upon this Commission jurisdiction or control over such an "obstruction" as a dam to be built in boundary waters from shore to shore across the international boundary line as here proposed and we are compelled to hold that as the treaty now stands we have no jurisdictional power to act upon the application before us.³³

The plans of the Ontario Company would have to be approved by the Governor in Council, and "when this approval has been obtained and the Dominion statute brought into operation there will be a mutual agreement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion,³⁴ and hence will obviously preclude the necessity or propriety of any action by the Commission".

Upon these arguments the Commission dismissed the ap-

³¹ *Ibid.*, p. 7.

³² *Ibid.*, p. 8.

³³ *Ibid.*

³⁴ Article xiii.

plications, four of the Commissioners, three Americans³⁵ and one Canadian³⁶ concurring in the majority opinion, and two others³⁷ dissenting.

The minority opinion sheds a considerable degree of light on some of the points established by the opinion of the court. First, Commissioner Powell, who wrote the dissenting opinion, says that he "cannot appreciate" the contention that the words in Article III, "obstructions or diversions whether temporary or permanent of boundary waters on either side of the line",³⁸ "do not include structures which extend beyond the boundary line or across the whole boundary waters and affect the flow on both sides of the line".³⁹ He maintained that the American structure would affect the level on the Canadian side, and the Canadian one on the American side.⁴⁰ "That each portion is organically or structurally connected with the other, and plays its part in disturbing the whole width of the river cannot alter this plain fact, that it is an obstruction on one side which affects the level or flow of the waters on the other. Not only is each portion an obstruction in fact, it is also an obstruction in law, and the courts of the country in which it is situate can abate it as such. Each portion of the dam is within the meaning of Article III." "Unless there is something in the context of the treaty which is inconsistent with this construction or unless it would lead to manifest absurdity, it must prevail."⁴¹

The provisions of the treaty "conferring jurisdiction

³⁵ Messrs. Tawney, Turner, Streeter.

³⁶ Mr. Casgrain.

³⁷ Messrs. Powell and Magrath.

³⁸ Article iii.

³⁹ Minority Opinion, p. 4.

⁴⁰ *Ibid.*, p. 5.

⁴¹ *Ibid.*

upon the Commission will be found upon careful examination to be most skilfully drawn and admirably designed to make the substitution with as little disturbance as possible of the *principles of law and international jurisprudence* which previously applied to boundary waters".⁴² If only a wing dam was prayed for from the American side with the approval of the government of the United States, the Commission had the jurisdiction to grant such approval and vice versa. Suppose then two separate constructions of two wing dams are placed under one agency which operates them at the same locality, there could be but one dam.⁴³

Then turning to the question of a "direct agreement" as alleged in the case, the Commissioner says that

the words "direct agreement" are most important. In regard to the rights of navigation possessed by the people and in regard to the rights of the riparian proprietors, the executive Government of either country does not, except as an extraordinary Treaty-Making Power, possess, in the absence of proper statutory authorization, the slightest power to alienate or impair them. The "direct agreement" must be regarded as being made in pursuance of this extraordinary Treaty-Making Power.⁴⁴

"To my mind it is one of the grossest absurdities to claim that the legislation comes up to the requirements of Article XIII of the treaty. There is not in it even a suggestion of a 'mutual agreement'." ⁴⁵ After these lengthy reasons for the minority's lack of concurrence with the opinion of the court, Mr. Powell concluded that even if there was doubt as regards the Commission's competence in

⁴² *Ibid.*, p. 7. Italics inserted.

⁴³ *Ibid.*, pp. 7-8.

⁴⁴ *Ibid.*, p. 13.

⁴⁵ *Ibid.*, p. 16.

the case, "it would be better to assume jurisdiction. If on the other hand the Commission has jurisdiction, a great deal of harm might be done by refusing to exercise it. In cases of this kind it is better to act on the old maxim, *boni iudicis est jurisdictionem ampliare*".⁴⁶

This was the very first case the Commission was called upon to examine and pass upon after its organization; it was perhaps fitting that its first opinion should bear upon its own jurisdiction under the treaty. The opinion presents certain interesting features, especially when it is pointed out that what may be called a "special agreement" in this case does not appear to have been a completed agreement between the high contracting parties themselves; the Congress had acted, of course, but not the Governor-in-Council; the opinion says that "when this approval [i. e. the approval of the Governor-in-Council of the Dominion of Canada] has been obtained and the Dominion statute brought into operation *there will be a mutual agreement*"⁴⁷ between the United States and Canada. According to the interpretation of the Commission, then, a "mutual agreement" need not necessarily be one between the two parties to the treaty, effected through the usual diplomatic channels; it would suffice if the two governments have acted, only in part, within their respective jurisdictions, regarding the same project on each side of the boundary. In this case the Congress had enacted the necessary legislation, and the War Department had issued its approval. On the Canadian side the Province of Ontario had acted, but not the Dominion Parliament, nor the Department of Public Works, when the Commission was called upon to decide the matter.

It may be noted here that in interpreting the provisions of Articles III and XIII, the Commission did not use any

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p. 9. Italics inserted.

external evidence or "travaux préparatoires" to discover what constituted a "special agreement", as used by the two governments in those Articles. The Commission did not inquire into the characteristics of any special agreement, if any, existing prior to or at the time of the treaty, between the two governments for purposes of comparison with the one involved in the case before it; nor did it inquire into the facts and circumstances under which that term had been employed. It confined its examination to the provisions of the treaty, the meaning of which appeared clear enough to it so that, applying the general rule of ascertaining the intention of the parties, on the "weight of competent evidence", it could conclude that the case before it was one in which it could not entertain jurisdiction.

Further, in the opinion of the Commission "the only evidence" that would be considered by it would be "the provisions of the treaty itself". As long as the provisions are clear and conclusive, so long this position would perhaps be tenable, but if doubt arises as regards the provisions themselves the natural question would then be whether or not the Commission may be compelled by the force of circumstances to advert to any appropriate extrinsic evidence which may throw light on the disputed issue.

2. In relation to the Webster-Ashburton Treaty of 1842:

According to Counsel Watson, the Commission lacked jurisdiction in the case of the Rainy River Improvement Company from the standpoint of Article VII of the Webster-Ashburton Treaty of 1842, which had been "in no way repealed, modified or varied by the present treaty"⁴⁸ (i. e. of 1909). He said that Article VII of the former treaty declared that

⁴⁸ *Hearings*, p. 77.

legislative action by the two governments and that therefore it does not fall within the class of cases requiring the Commission's approval.⁵⁹

With this view in mind, the State Department had already advised the General Counsel of the Buffalo and Fort Erie Public Bridge Company that "the Department considered that the complementary acts of the Canadian Parliament and the Congress of the United States rendered a reference of the matter to the International Joint Commission unnecessary".⁶⁰ Whether because of this position or not, the State Department was not represented at the hearings.

2. The position of the Canadian Government :

The Canadian Government on the other hand was represented by Mr. O. M. Biggar, who took a counter-view from that of the United States regarding the question of the reference of the case to the Commission. So Commissioner McCumber (U. S.) asked in the very initial stage of the hearings whether

in view of the fact that the Canadian Government, through its officers, has indicated a view in opposition to the attitude taken by the State Department of the United States with reference to the necessity of having the Commission pass upon this application, should we not have at this time before us the particular position taken by the Canadian Government either in a letter or in any order that may have been passed by the Council? ⁶¹

Mr. Biggar submitted that "what Mr. Grew's letter ⁶² says is that there has been a special agreement in accord-

⁵⁹ *Hearings*, p. 8.

⁶⁰ *Ibid.*, see correspondence, pp. 7-9.

⁶¹ *Ibid.*, p. 9.

⁶² Mr. Grew, Under Secretary of State of the United States, notified the Commission of the position of the United States in relation to the application; *Hearings*, pp. 7-8.

ance with Article XIII of the treaty. I say there is no such agreement.”⁶³ Upon this Commissioner McCumber wanted to know how the government of Canada had taken its position; Mr. Biggar replied, “By instructing me to appear”.⁶⁴ Then the Dominion Counsel reaffirmed that he differed from Mr. Grew’s position, that “there is no agreement expressed in legislation and that therefore the Commission has jurisdiction”.⁶⁵ He maintained that there was no mutual arrangement expressed by “concurrent legislation”,⁶⁶ and that the position of the Commission at the moment was that Mr. Grew had “expressed one view of the interpretation of the treaty. The Canadian Government takes an opposite view of the interpretation of the treaty. The effect of the adoption of Mr. Grew’s view would be to exclude the jurisdiction of the Commission. The effect of the adoption of the Canadian view would be to affirm the jurisdiction of the Commission”. If the Canadian government’s view was right, then the Bridge Company would not have

the right or the jurisdiction to go on and invest \$2,000,000 with any security that they are doing a legal thing. If, on the other hand, the American Government’s view is right, then they are perfectly safe in going on and making their investment. The final arbiter of the question is not the Commission but the highest courts of law in Canada and in the United States respectively. If the Canadian Government’s view is right and if this company do an illegal thing in going on and constructing this bridge without your Commission approving of it, then, if the construction of the bridge were attacked in the Canadian Courts, one would have to go to the Privy Council to find out what the interpreta-

⁶³ *Ibid.*, p. 9.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, p. 10.

⁶⁶ *Ibid.*

tion of the treaty was. If on the other hand, it was attacked in the American Courts, you would have to go to the Supreme Court of the United States to find that out. . . .

What I would suggest is that the application . . . should be heard regardless of this question of jurisdiction. If, practically, there is no reason why the Commission should not make the order [of approval], and if nobody objects to the order being made, the Commission puts the Company in a perfectly safe and unexceptional position. . . . I can only say that in so far as the Canadian Government is concerned, the Canadian Government's view is that if the Company should go ahead without the approval of the Commission it would be doing something illegal. . . . So long as the order of approval is made and the company is satisfied there is nothing further for us to say.⁶⁷

To this counsel for the applicant company added that it was much better that the bridge company should be in a position where no question could arise in the future, as to the liability of their structure,⁶⁸ although as regards the legal question concerning the reference of the application to the Commission for its decision he believed "that the opinion expressed by the Secretary of State of the United States⁶⁹ is right".⁷⁰

3. The position of the Commission:

Before the hearings were over, however, various witnesses were called in to ascertain the technical and engineering problems involved in the construction. When all the necessary evidence, both written and oral, had been studied by the Commission, it handed down an order of approval to the applicant company. Several reasons were adduced by the Commission for its conduct and decision in this case.

⁶⁷ *Ibid.*, pp. 11-12.

⁶⁸ *Ibid.*, p. 13, Mr. Van Allan.

⁶⁹ See Mr. Grew's letter.

⁷⁰ *Hearings*, p. 12.

First, there were the two enabling acts of Congress and Parliament respectively, which authorized the construction;⁷¹ secondly, there were no objections filed by anybody to "defeat or modify the order of approval sought by the applicant" or to require that the construction be approved upon certain conditions;⁷² thirdly, the applicant company was "specially desirous" that the Commission "shall grant this approval of said application to the end that no possible question may arise in the future as to its authority to so construct and operate such bridge",⁷³ and lastly, the Commission deemed it "unnecessary under the circumstances at this time to pass upon the said respective contentions of the two countries",⁷⁴ i. e. whether or not the case should be regarded as excluded from the jurisdiction of the Commission under Articles III and XIII of the treaty of 1909.

In the light of this order of approval and the action of the Commission in relation to the application of the Rainy River Improvement Company, certain observations seem necessary. In the latter case the Commission had before it an act of Congress and an approval by the War Department on the American side, and on the Canadian side a provincial authorization and a pending application for approval of the Governor-in-Council of Canada and the Department of Public Works. Consequently there were no two complementary acts enabling the applicant companies to proceed with their contemplated dam in the Rainy River. The Commission, nevertheless, concluding that when the Governor-in-Council had given the necessary approval of the project "there will be a mutual arrangement" between

⁷¹ *Ibid.*, Order, p. 2.

⁷² Order, p. 1.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, p. 2.

the two governments, dismissed the application for want of jurisdiction.

In the case of the Bridge Company, the situation offered no doubt as regards the two acts on the respective sides of the boundary. There was an act by the Dominion Parliament, so also was there an act by the Congress; both acts were admitted as authorizing the applicant to undertake his project. Because of the authority granted by the two governments, the government of the United States maintained that under Articles III and XIII the matter did not require a reference for decision by the Commission. The Canadian government, through counsel, opposed this view. Looking at the two cases, one is almost compelled to say that if in the former case the incomplete legislation constituted a "special agreement", there appear to have been better and more adequate grounds in the latter for the conclusion that a "special agreement" had been made, as Mr. Grew's letter clearly seemed to imply. The Commission, however, regarding it "unnecessary under the circumstances . . . to pass upon the said respective contentions of the two countries",⁷⁵ ordered that the plans of the Bridge Company be approved.⁷⁶

Another interesting factor in the two cases is that in both of them the government of the Dominion represented that *the Commission had jurisdiction*. In the Kettle Falls case⁷⁷ Counsel Thompson representing the Canadian Government held that "in the absence of any such direct agreement or reciprocal or concurrent legislation . . . it is competent for this Commission to pass upon the expediency, the advisability, and to inquire into the damage if any that such a dam may cause to the inhabitants on one side or the other

⁷⁵ *Ibid.*

⁷⁶ *Cf.* Minority Opinion, *R. R. Imp. Co.*, p. 16.

⁷⁷ *R. R. Imp. Co.*, case.

of the boundary line".⁷⁸ In the Bridge Company case also the Canadian view represented through Mr. Biggar was that "the Commission had jurisdiction".⁷⁹ In this case also no extrinsic evidence or facts or circumstances were offered by counsel or resorted to by the Commission in order to interpret the phrase "special agreement".

3. The Michigan Northern Power Company case.⁸¹

In this case the issue was whether the Commission had the necessary power under the treaty to impose conditions upon applicants, "as conditions of its order".⁸² The Commission held that this power was conferred by the treaty and that the existence of such a power was "a necessary concomitant to the carrying out of the true intent and purpose of the treaty. . . ." ⁸³ It would appear that the Commission arrived at this conclusion through a liberal interpretation of the treaty, because the Commission placed reliance in this connection upon a decision of the Supreme Court of the United States, delivered by Justice Brown in the case of *Tucker v. Alexandroff*,⁸⁴ where it was held that "as treaties are solemn engagements entered into between independent nations . . . they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or of those principles of personal liberty which lie at the foundation of our jurisprudence". After citing Justice Brown, the Commission pointed out that "the rule here laid down [in his decision]

⁷⁸ *Ibid.*, *Hearings*, pp. 96, 97, 101.

⁷⁹ *Hearings, B. and F. E. P. B. Co.*, p. 10.

⁸¹ For discussion of case, see *supra*, p. 149 *et seq.*

⁸² See Opinion, p. 20.

⁸³ *Ibid.*

⁸⁴ (1901) 183 U. S. 424.

is the general rule of interpretation and recognized and applied by courts in their interpretation of treaties".⁸⁵

Further, the Commission indirectly referred to the facts and circumstances that were conducive to the conclusion of the treaty of 1909. "This treaty implies", reads the opinion, "and it is a matter of common knowledge that for many years prior, questions of difference and in some instances serious controversies existed between the United States and Canada, and between their people, growing out of the use of the waters that mark the boundary between them."⁸⁶ Then the Commission says that "one of the purposes of the treaty . . . was to provide for the final settlement" of all controversies then pending or likely to arise in the future.⁸⁷ To support this position the Commission, after referring to the Preamble of the treaty of 1909, adduced one of its own previous opinions which also refers to the situation existing on either side of the boundary prior to the conclusion of the treaty of 1909.⁸⁸ Finally the Commission adds, "It was for these reasons and because of this situation that provision was made in Article VIII of the treaty, giving to the Commission discretion, limited only by its judgment, as to the conditions under which any obstruction, diversion, or use of the boundary waters should thereafter be approved."⁸⁹

4. The Algoma Steel Corporation, Ltd., case.

In this case also, as in the previous one, the question of the Commission's powers to define what provisions would

⁸⁵ Opinion, p. 20.

⁸⁶ *Ibid.*, p. 21, see the question of the apportionment of the St. Mary and Milk Rivers under Article vi. See *infra*, chap. v.

⁸⁷ Opinion, p. 21.

⁸⁸ *Ibid.*, opinion of Commissioner Turner in the Michigan Northern Power Company lease application.

⁸⁹ *Ibid.*, p. 21; see in general pp. 20-23.

be suitable and adequate under Article VIII was answered by the opinion written by Commissioner Casgrain of Canada.

Who but the Commission is the judge of suitability and adequacy of the provision. . . .? I see nothing to prevent us giving our approval temporarily to certain works and declaring that if after a certain time or under certain circumstances it appears that they do not constitute a suitable and adequate protection, other works to meet the requirements of the case shall be constructed.⁹⁰

5. The Creston Reclamation Co. Ltd., case.

In this case doubt was raised as regards the character of the Kootenay River under the treaty. Commissioner Sir William Hearst asked the counsel for the applicant company what was the specific provision of the treaty the latter relied on as applying to his case and compelling him to get the approval of the Commission.⁹¹ The counsel replied, "I refer now to Article III." The Commissioner thereupon wanted to know what part of Article III the applicant would violate. The counsel submitted, "We say it may come within these words, 'affecting the natural level or flow of boundary waters on the other side of the line'."⁹² Then Sir William asked the counsel, "Are these boundary waters within the meaning of the treaty?" The counsel replied, "I presume they would be."⁹³

Commissioner Magrath (Canada) did not agree with this position, so he asked the counsel whether he was not "quoting the wrong Article? It would be Article IV referring to waters flowing across the boundary."⁹⁴ Immediately

⁹⁰ Opinion, *Algoma*, pp. 23-24.

⁹¹ *Hearings*, p. 28, *Creston Reclamation Co., Ltd.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

the counsel shifted from his prior position and said, "Yes, in waters at a lower level than the boundary."⁹⁵ At this juncture Sir William cited the Preliminary Article of the treaty which defines what boundary waters are, and what the exceptions therefrom.⁹⁶ Quickly the counsel once again changed his position and said, "The Kootenay River flows across the boundary; it rises in Canada and goes down into the United States."⁹⁷ Commissioner Powell on this occasion came out with his impression that the river in question was "expressly excluded" according to the provisions of Article IV, rather than the Preliminary Article on which Sir William insisted.⁹⁸

After all these doubts and assertions, the Commission arrived at a unanimous opinion as to the character of the Kootenay when the time came for issuing its order. "The Kootenay River", held the Commission, "is a river flowing across the boundary between Canada and the United States *within the meaning of Article IV of the treaty.*"⁹⁹

6. The case of the St. Lawrence River Power Company.

In the case of the St. Lawrence River Power Company the jurisdiction of the Commission was again contested on the ground that Article VII of the Webster-Ashburton Treaty of 1842 was in direct conflict with the purport of the application, which was to close the South Sault Channel, or the South Channel of the St. Lawrence River by means of a submerged weir which the above mentioned company proposed to build in order to increase its power supply to the Aluminum Company of America. Article VII of the treaty

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, p. 29.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Order, p. 1.

of 1842 declares that "the channels of the river St. Lawrence on both sides of Long Sault island and Barnhart island shall be equally free and open to the ships, vessels and boats"¹⁰⁰ of the two countries.

Long Sault Island is situate in the St. Lawrence river where it divides the Canadian province of Ontario from the American state of New York. The waters of the river at this point between the island and the Canadian shore are called the North Sault Channel, or North Channel, through which runs the international boundary. Between the island and the American shore run some of the waters of the St. Lawrence river, through the channel known as the South Sault Channel, or South Channel. Thus the two channels referred to in Article VII of the Webster-Ashburton Treaty appear to be the North and South Channels of the St. Lawrence river.¹⁰¹ Consequently the question was whether the prior treaty was superseded by the provisions of Articles I, III, IV and VIII of the treaty of 1909 whereby the Commission exercises jurisdiction over all boundary waters.

(a) The position of Counsel for the United States Department of State.

When the case came up for hearing, Commissioner Powell (Canada) asked Judge Koonce, who was representing the State Department of the United States, whether or not the subject matter of the application "is affected by the Webster-Ashburton Treaty", both channels having been mentioned in that treaty.¹⁰² Mr. Koonce replied that if the word "equally" as used in Article VII of the Webster-Ashburton treaty of 1842 is considered, it would indicate that by Article VII "these various channels shall be equally

¹⁰⁰ Article VII, Webster-Ashburton Treaty, 1 Malloy, *op. cit.*, p. 655.

¹⁰¹ Opinion, *St. L. R. R. Co.*, 1918, p. 3.

¹⁰² *Hearings*, p. 8 (1918).

free and open to both parties". Consequently there could be no discrimination in the use of the two channels. In other words, there was nothing in the treaty of 1842 which would require the maintenance on the American side of anything "perpetually free and open; . . . if you construct a canal there on your side of the line you allow us to use it on the same terms which you allow your own people".¹⁰³

On the question of the treaty of 1909 superseding the treaty of 1842, Mr. Koonce had no doubts at all that the waterways treaty "supersedes the Webster-Ashburton Treaty and all other treaties so far as water boundaries are concerned". This did not imply, however, that the provisions of the Webster-Ashburton treaty and the treaty of Washington, of May 8, 1871, were by virtue of the treaty of 1909 nullified or abrogated; all those provisions were in effect, only so far as the boundary waters were concerned they were no longer binding, and therefore the power and authority delegated by the treaty of 1909 to the Commission was sufficient to deal with the question in hand.¹⁰⁴

(b) The position of Counsel for the Canadian Government.

The Hon. Mr. Guthrie and Mr. Keefer strenuously opposed the position of Mr. Koonce. Mr. Guthrie in his status as the Solicitor General for the Dominion administration made a very lengthy reply tracing the history of the word "equally" as used in Article VII of the Webster-Ashburton treaty.^{104a} His purpose in doing so seems to have been to convey to the Commission the full implications of that much-disputed word. He therefore first alleged that Mr. Koonce had taken the position that if the South Channel of

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, p. 9.

^{104a} *Ibid.*, pp. 126-135.

the St. Lawrence river were closed, it would be closed against both the parties, thus according a non-preferential treatment to both countries, "because then there would be an equality of non-user which would satisfy the language of the treaty". Mr. Guthrie could not concede this position. He therefore delved into the history of the word "equally". He submitted that "in the original draft" of the treaty of 1842, the word had not been used and that it did not find a place in any of the other provisions of that treaty as it was finally formulated. Consequently he had to go outside the treaty to discover why and how that term found its eventual entry into the document. He then referred to the works of Daniel Webster,¹⁰⁵ which were published fourteen years after the conclusion of the Webster-Ashburton treaty. These works contained elucidating references to the negotiations between Mr. Daniel Webster, then United States Secretary of State, and Lord Ashburton, then the British Ambassador to the United States, regarding the treaty of 1842.¹⁰⁶

In one of his letters Lord Ashburton wrote to Mr. Webster¹⁰⁷ that under certain circumstances the passage of a British vessel through the South Channel might be refused; therefore he suggested that "we want a clause in our present treaty to say that for a short distance, namely, from upper end of Upper Long Sault island to the lower end of Barnhart island the several channels of the river shall be used in common by the boatmen of the two countries".¹⁰⁸

Mr. Webster replied, in a communication dated July 27, 1842:

Beside agreeing upon the line of division through which these

¹⁰⁵ *Works of Daniel Webster* (Boston, 1856).

¹⁰⁶ *Ibid.*, vol. vi, p. 282.

¹⁰⁷ July 16, 1842.

¹⁰⁸ *Works of Daniel Webster, op. cit.*, vol. vi, p. 282.

controverted portions of the boundary pass, you have suggested also, as the proposed settlement proceeds upon the ground of compromise and equivalent, that boats belonging to Her Majesty's subjects may pass the falls of the Long Sault, in the St. Lawrence, on either side of the Long Sault Islands, and the passage between the islands lying at or near the river St. Clair with the lake of that name shall be severally free and open to the vessels of both countries.¹⁰⁹

According to Mr. Guthrie, Mr. Webster was interested in the St. Clair river, the channel of which "happened" to pass to Detroit through Canadian waters. It appeared therefore necessary to the American Secretary to have the proposed clause in the treaty made as plain and definite as possible, and the treatment for both countries made equal, so that there would arise no future occasion for a dispute on the ground that "the important channel at Detroit was wholly in Canadian waters, and that might not accord equal treatment to the ships of the United States".¹¹⁰ He agreed that the matter should indeed be adjusted, and therefore added at the end of his letter, "it being understood that all the water communications and all the usual portages, along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries".

On July 29, 1842, Lord Ashburton wrote a letter to Mr. Webster, at the close of which the ambassador says: "I should remark, also, that the free use of the navigation of the Long Sault passage on the St. Lawrence must be extended to below Barnhart island, for the purpose of clearing those rapids."¹¹¹ On another page of the same volume,

¹⁰⁹ *Hearings*, p. 127; *Works of Daniel Webster*, *op. cit.*, vol. vi, p. 284.

¹¹⁰ *Hearings*, p. 127.

¹¹¹ *Hearings*, p. 128.

in the letter of Mr. Webster, it is said: "So, again, there are several channels or passages of different degrees of facility and usefulness, between several islands in the river St. Clair, at or near its entry into the lake of that name. In these three cases, the treaty provides that all the several passages and channels shall be free and open to the use of the citizens and subjects of both parties."¹¹²

After the making of the draft-treaty, which is said to be in the handwriting of Mr. Webster,¹¹³ it was transmitted by President Tyler to Congress, and it was then that the word "equally" was inserted—and it is said here in the handwriting of Mr. Webster "to make plain and clear that the usage and rights of those waters specifically mentioned in paragraph 7 of the treaty should be equally free and equally open to the ships, vessels, and boats of both parties"—Mr. Webster's interest, in Mr. Guthrie's words, "being at Detroit rather than in the St. Lawrence, and the interest of Lord Ashburton, according to his original letter, being more particularly in regard to the St. Lawrence river".¹¹⁴ "That is so plain a declaration", continued the Solicitor General, "in so prominent a document as an international treaty, that I do not see how any tribunal or any court could vary it or set it aside in any way, but, on the contrary, it must be bound by it and give it effect."¹¹⁵

After this lengthy historical sketch to discover the full implication and purpose of the word "equally" as used in the treaty of 1842, Mr. Guthrie proceeded to the examination of the treaty of 1909,¹¹⁶ to point out that Article I of the latter treaty, which refers to the safeguarding of navi-

¹¹² *Works of Daniel Webster, op. cit.*, vol. vi, p. 352.

¹¹³ *Ibid.*

¹¹⁴ *Hearings*, pp. 126-128.

¹¹⁵ *Ibid.*, p. 128.

¹¹⁶ *Ibid.*, p. 129.

gation on the boundary waters, should not be so construed by the Commission as to establish its jurisdiction under Articles III and VIII of the same treaty over the South Channel.¹¹⁷ "The moment there is interference with what the article [i. e. Article I of 1909] calls 'privilege of free navigation', then neither country has any jurisdiction in its own international waters, or its own territorial waters, to do any act."¹¹⁸ The treaty of 1909 makes that of 1842 "stronger".¹¹⁹

At this stage another word came up for interpretation. Commissioner Powell wanted to understand the meaning of the word "free" as used in Article VII of the Webster-Ashburton Treaty. "That word 'free' is a technical term." To this Counsel Guthrie replied that that word was "about the broadest"; here Commissioner Powell interposed, saying that "it is at once the broadest and the most constricted", and asked further what the "legal use" of the term was.

By a process of evolution [said he] the original meaning of the word 'free' has been departed from until it can be more fairly described by saying that it was very restricted. Take the law in respect to the highway. Every individual in the United States or Canada has a right to the free and uninterrupted use of the highway. They have the free and uninterrupted use of a river. At the same time a man using the highway can back his cart in against the sidewalk as long as he does not unreasonably interfere with the driving of others. A vessel can anchor in a stream where another vessel may be beating against the wind and have to get out of his way, and that other man has not a free and uninterrupted use.¹²⁰

¹¹⁷ *Ibid.*, pp. 129-130.

¹¹⁸ *Hearings*, p. 130.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, p. 134.

Mr. Guthrie admitted that it was so. Commissioner Powell, following up his thought further, asked whether the case was not one wherein "the free and uninterrupted navigation of a river would not prevent the owner, if the owner had such a right of soil in the bed of the river, from erecting therein a pier stretching out so long as it did not unreasonably interfere with navigation", and whether the question of "unreasonable right to navigation" could be tried out in a suit for a nuisance; "the thing would be whether it was reasonable or not". To substantiate his position Mr. Powell later adduced several cases decided by the British Privy Council,¹²¹ by the King's Bench,¹²² and by the Supreme Court of the United States.¹²³ He also placed reliance on two other controversies¹²⁴ that took place between Great Britain and the United States prior to 1842, to point out that reasonable interference with navigation was not a violation of the right of navigation, but a "reasonable exercise of the right of property".¹²⁵

After these remarks the Commissioner turned to the treaty of 1842. "If you go back to the Ashburton Treaty", said he, "you may restrict the word 'free' and adopt it as a highly technical term which does not mean free as given by lexicographers; yet you cannot restrict it to the point of absolute prohibition." To this Counsel Guthrie replied that

¹²¹ Mr. Powell's opinion, Ottawa, 1918, *In the Application of the St. Lawrence River Co.*, p. 7; Lord Kingsdown in *Minor v. Gilmour* (1901), 12 Moore, P. C., p. 861; also Lord Blackburn in *Orr Ewing v. Colquhoun*, English House of Lords Reports, Reported in L. R. 2, A. C. 1876-7, Eng. House of Lords.

¹²² L. R. [1908], 1 K. B., 554; *King v. Bartholomew*.

¹²³ *Pennsylvania v. Wheeling Railroad Co.* (1851), 13 Howard 518 (U. S. Supreme Court Reports).

¹²⁴ Case of Mr. Baird, an American citizen in 1883, Opinion, p. 11; also the controversy on the Bridge at Andover, 1875, *ibid.*, p. 13.

¹²⁵ Opinion, p. 16.

"it has been argued that that word 'open' was put in to extend it, and you have both words to deal with. So if one foot is not on strong ground, the other foot is."¹²⁶ Here Commissioner Mignault (Canada) suggested that "the word 'open' with the word 'free' shows that navigation should not be restricted."¹²⁷ Whereupon Commissioner Powell said that

in the United States there was an island in the center of a river, and the railway company was building two bridges. The right of free and uninterrupted navigation was invoked, and it came before the Supreme Court of the United States in the way of getting an injunction against the railway company for putting the bridges over one branch of the stream and absolutely closing it. The Supreme Court . . . held that inasmuch as there was an ample and sufficiently capacious alternate route, the injunction would not lie.¹²⁸

This observation appears to have been easily shaken when the Solicitor General for Canada immediately objected, saying, "They [the parties in the bridge case to which Mr. Powell referred] did not have a treaty with another nation that said that both routes shall be open. . . . I am making no suggestion of that kind at all. We are sleeping at night on the Ashburton Treaty."¹²⁹ These remarks closed the arguments of Mr. Guthrie.

He was followed up by his colleague, Mr. Keefer, also counsel for the Dominion Government. The chief contention of Mr. Keefer appears to have been that the term 'equally' is qualifying 'free and open'. Suggestion of Counsel for the other side [i. e. Mr. Koonce] is untenable.

¹²⁶ *Hearings*, p. 134.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, p. 135. See also *Opinion*, p. 9.

¹²⁹ *Hearings*, p. 135.

The words are 'equally free and open'. . . . It is a pretty good Irish bull to say that if it is closed it is open, and it is free."¹³⁰ Representatives for the Dominion Marine Association, the Commission of Conservation of Canada, and the State of New York, all argued against the application upon approximately the same grounds as those covered by Mr. Guthrie.

(c) Reply for the State Department.

Judge Koonce arose to add a few more words to his original position. He did not go back on his interpretation of the words "equally" or "free" or "free and open".

I would like to call your attention [said he to the Commission] to the fact that apparently at the time this treaty [of 1842] was made those who drafted it seemingly considered that there was no navigation along this part of the St. Lawrence river. You will see what they say in Article III which relates to the St. John River. . . . It is stated in Article III that 'navigation of the said river shall be free and open to both parties, and shall in no way be obstructed by either',¹³¹ recognizing the fact that there was a navigation they were providing for.¹³²

Then he adduced that section of the treaty of Washington of May 8, 1871,¹³³ which provided that "the navigation of the river St. Lawrence . . . shall forever remain free and open for the purposes of commerce".¹³⁴ He also referred to Article XXVIII of the same treaty which declared that the navigation of Lake Michigan was to be "free and open for the purpose of commerce" for a specific term of years.

¹³⁰ *Ibid.*

¹³¹ Malloy, *op. cit.*, p. 653, Art iii.

¹³² *Hearings*, p. 159.

¹³³ Malloy, *op. cit.*, pp. 700-716.

¹³⁴ *Ibid.*, p. 711, article xxvi.

Thus he sought to prove that those who concluded the Webster-Ashburton Treaty did not have in mind navigation in the South Channel of the St. Lawrence.

All that is said in this Webster-Ashburton Treaty is that the channels shall be free and open to the vessels, ships and boats of both parties, which indicates to me that they recognized at that time that there was no useful navigation in these rivers, and that they were providing for a possible or potential navigation, for instance, something like the Cornwall Canal on the Canadian side and possibly some similar canal on the American side; in other words, those channels should remain free and open for the ships if those ships materialized and navigation was to be provided for. They do not use the word "navigation" or the word "commerce".

Using the word "navigation" for commerce in connection with all these streams where navigation existed, and the omission of those words in relation to the St. Lawrence, may have been due to the fact that they knew that there was no commerce and no navigation of these streams, but there was a potential or possible navigation which has since been created by the Cornwall canal. . . .¹⁸⁵ The Webster-Ashburton Treaty was in full force and effect until 1909, when the same High Contracting Parties made a new treaty. . . . And, so far as the use and diversion of boundary waters are concerned the Webster-Ashburton Treaty has now no binding force. . . . The St. Lawrence river at the point where these works (of the St. Lawrence River Power Company) are being constructed, covered by this application, is a boundary stream between the United States and Canada, under the definition of this treaty (1909), and being a boundary system it necessarily comes within the purview of that treaty.¹⁸⁶

Thus Judge Koonce and the other representatives rested their cases after able arguments on behalf of their respec-

¹⁸⁵ *Hearings*, p. 159.

¹⁸⁶ *Ibid.*, p. 160.

tive clients, and left the Commission to form its decision on the question. On September 14, 1918, the Commission delivered its opinion and issued an order of approval, as an interim measure. In the order the Commission said that it was issued

without at the present deciding the question whether the Commission should approve the construction and permanent maintenance of the said weir, and without prejudice in any way to its right to decide such question hereafter, and in view of the pressing necessity for the immediate increase for war purposes of the available supply of aluminum, and at the urgent request of the United States.¹⁸⁷

(d) The position of the Commission.

Then the Commission tackled the two questions involved in the case: (1) its jurisdiction in the premises in the light of the Webster-Ashburton treaty, and (2) the superseding of Article VII of the Webster-Ashburton treaty by the treaty of 1909.

Jurisdiction.

"The position taken by the Dominion of Canada", reads the opinion, "as well as its statement in response as by the argument of Counsel on its behalf, may be briefly summarized by stating that it denied the jurisdiction of the Commission to grant the application, on the ground that the proposed submerged weir would entirely close to navigation the South Channel of the St. Lawrence River at the Long Sault, and that by Article VII of the Webster-Ashburton Treaty of 1842 it was agreed that this channel "shall be equally free and open to the ships, vessels and boats of both parties", and also that by Article I of the treaty of January 11, 1909 (hereafter called the Waterways Treaty) it was

¹⁸⁷ Order, p. 5.

stipulated that "the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels and boats of both countries equally."¹³⁸ Interests other than the Government of the United States and the applicant company also objected to the jurisdiction on the same ground, and to the application on the ground of a possible larger scheme that might materialize regarding the St. Lawrence River as a whole.¹³⁹ The Canadian Government had, in addition, contended that the matter was one that "should be dealt with by direct negotiations between the High Contracting Parties". "Briefly stated, this denial of jurisdiction contends that inasmuch as it was agreed that the South Channel should be equally free and open to the ships, vessels and boats of both parties, the Commission has no jurisdiction to grant the prayer of the applicant." "If this means that because of Article VII of the Webster-Ashburton Treaty the Commission should not, as a matter of international right, grant the present application, the point is one that can be very properly urged before the Commission, but if the objection be to the jurisdiction of the Commission to consider and pass upon the application and to grant the prayer of the same, if the applicant has justified the right thereto, the Commission is unable to agree with this contention." "It is obvious that the whole foundation of the jurisdiction of the Commission is to be found solely in the Waterways Treaty. A stipulation made in the Webster-Ashburton Treaty may be binding on the High Contracting Parties, and may be so considered by the Commission, but it is certainly without effect on the jurisdiction conferred on the Commission by the Waterways Treaty."¹⁴⁰ "The

¹³⁸ Opinion, p. 10.

¹³⁹ *Ibid.*, p. 10.

¹⁴⁰ *Ibid.*, p. 19.

South Sault Channel (the South Channel) is a boundary water within the definition of the Treaty, the preliminary Article of which defines boundary waters 'as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary . . . passes, including all bays, arms, and inlets thereof, . . .'¹⁴¹ Therefore the Commission has jurisdiction with regard to any obstruction intended to be placed in this channel, which is undoubtedly a boundary water, and the proposed weir is such an obstruction."¹⁴² "The South Channel is a navigable boundary water."¹⁴³ Thus the Commission showed that whether or not the Webster-Ashburton Treaty of 1842 was superseded by the Waterways Treaty of 1909, it was immaterial to the question of its jurisdiction. This opinion was written for the Commission by Commissioner Mignault of Canada.

Commissioner Powell, also of Canada, however, wrote an independent opinion. He indeed agreed with the order and opinion of the Commission; but because his colleague had not dealt with "the legal phases,"¹⁴⁴ of the question, he was persuaded to write a separate opinion. Being therefore an opinion of one of the Commissioners who assented to the decision of the Commission on legal grounds, sections of Mr. Powell's opinion appear interesting as regards questions of jurisdiction, the use of technical terms and the superseding of the treaty.

a. Jurisdiction.

Remarking that the arguments of counsel for Canada

¹⁴¹ Preliminary Article, Treaty of 1909, Redmond, *Treaties*, vol. iii, p. 2608.

¹⁴² Opinion, p. 19.

¹⁴³ *Ibid.*, p. 20.

¹⁴⁴ Powell's opinion, p. 23.

"were able as far as they went", the Commissioner said that they chiefly placed their reliance upon the fact that while Article VII of the Ashburton treaty "dealt with a few cases only", Article I of the waterways treaty "was a general provision", and consequently that "the well-known principle applied, that subsequent general provisions do not of themselves by mere implication abrogate prior provision." Mr. Powell then divided the Canadian case into two parts:

I. The term "boundary waters" as used in Article I of the treaty of 1909 does not include the waters mentioned in Article VII of the Webster-Ashburton Treaty, and therefore "the Commission has no jurisdiction to deal with navigation in the South Channel. . . ." ¹⁴⁵

Mr. Powell assailed this contention, holding that there was "nothing expressed or implied in the context of the treaty of 1909 which can be construed as cutting down the plain words of its definition of boundary waters". Acquiescence in the Canadian position "would lead to inconsistency and absurdity". To substantiate his opinion Mr. Powell pointed out that if the South Channel was not a boundary, then Canada could not be entitled to any share of the 42,000 undeveloped horsepower that could be harnessed in that channel. ¹⁴⁶

II. If the phrase "boundary waters" does, on the other hand, include the South Channel, it does so only with a "feature of inviolability" which the Canadian counsel "created", and which, according to their contention, "the Commission must respect", and therefore "the applicant's case must fail". ¹⁴⁷

In reply to this contention Mr. Powell said that in form-

¹⁴⁵ *Ibid.*, pp. 13-15.

¹⁴⁶ *Ibid.*, p. 14.

¹⁴⁷ *Ibid.*

ing a decision upon this issue, "the treaty of 1909 must be considered in view of *the facts and circumstances* which led up to and existed at the time the Ashburton Treaty was entered into, and the facts and circumstances which led up to and existed at the time the treaty of 1909 was adopted".¹⁴⁸ Here the Commissioner described how at the date of the treaty of 1842 "all commerce along the St. Lawrence was by way of the North Channel and the South Channel"; how both countries had the right to navigate the North channel, while Canada had no such right "in the South Channel"; how as early as 1816 the question of the construction of the Cornwall Canal came before the legislature of Upper Canada, and a commission was appointed in 1833 which started construction in 1834, when "on account of the rebellion" the work had to be suspended, and was resumed only in 1842 when the Ashburton Treaty was entered into.¹⁴⁹ After enumerating these historical facts and circumstances, the Commissioner goes on to say that "in view of the turbulence of the North Channel, Canada, as appears by the *correspondence between Lord Ashburton and Mr. Webster*, anxiously desired to secure the right of navigation in the South Channel. Undoubtedly this desire was on account of the delay in the construction of the canal."¹⁵⁰

Then Mr. Powell described the facts and circumstances existing "before the adoption of the Treaty of 1909". According to him, "the old system of transportation" had changed at the Long Sault, and the construction of the Grand Trunk Railway and the Cornwall Canal on the Dominion side as well as the construction of the Grand Trunk and the New York Central lines on the American side had reduced the once "substantial commerce" on the South

¹⁴⁸ *Ibid.*, p. 15. Italics inserted.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* Italics inserted.

Channel into the "veriest triviality", so that the only existing navigation was in the North Channel. Consequently at the time of the adoption of the treaty of 1909 "the South Channel was, and it ever since has been, and probably it forever will be, unnecessary for purposes of navigation".¹⁵¹

b. Technical meaning of terms.

"Great stress was laid by Counsel [for the Dominion Government] upon the provision that the channel [South Channel] shall be 'free and open' to ships, vessels and boats of both parties. When applied to navigation the words 'free and open' have not their ordinary meaning, but an artificial and technical meaning; and no violation of the requirements of these words of the treaty is caused by any reasonable interference with navigation."¹⁵²

c. Superseding of the treaty.

On this question Mr. Powell did not establish any opinion at all, but he brought out a series of questions which throw some light on the nature of the problem as it occurred to him.

Did or did not [he asks] the High Contracting Parties negotiate and agree in 1909, in view of the then existing condition of affairs, or the condition existing in 1842 when the Ashburton Treaty was adopted? And did or did not they intend to perpetuate in the South Channel a technical or theoretical right of navigation which had fallen into almost desuetude?¹⁵³ Since the right of navigation provided by Article VII of the Ashburton Treaty in the South Channel has fallen completely into disuse, and there is no human probability of there being any revival of its uses, should or should not the right be treated as

¹⁵¹ *Ibid.*, pp. 15-16.

¹⁵² *Ibid.*, pp. 10-11.

¹⁵³ *Ibid.*, p. 16.

having lapsed? . . . Is it or is it not likely that four, or at most five channels of the thousand channels or upwards in the boundary portion of the St. Lawrence river, should without any apparent reason retain a special status of inviolability? By making subject to certain rules and regulations the right of navigation provided for in Article I of the Treaty of 1909, does or does not that treaty supersede the right expressed in absolute terms in Article VII of the Ashburton Treaty? . . . In the case of *La Republique Francaise v. Schultz* (1893) 57, Federal Reports (U. S.) page 37, it was held that the treaty between the United States and France of April 16, 1869, was implicitly repealed by the Industrial Property Treaty of 1883, since the latter treaty covered the whole matter of the former. Might not Article I of the Treaty of 1909 impliedly repeal Article VII of the Ashburton Treaty? ¹⁵⁴

These questions would possibly serve as whetstones for future occasions when the Commission would find no alternative but that of expressing its opinion where the two treaties might again be in conflict; furthermore they might be of some assistance in lining up the arguments that might enter into a consideration, as far as the treaty of 1842 is concerned, of the familiar doctrine of "*rebus sic stantibus*" — whether a change of circumstances may bring about a change in part or whole in the applicable validity of a treaty which may not have been duly abrogated by the parties thereto.

The St. Lawrence River Power Company's case had certain interesting features. As already noted, there was a specific attempt on the part of counsel, both American and Canadian, to place adequate reliance on *facts and circumstances* that attended the use of words and phrases in the two treaties. Counsel for Canada clearly resorted to what should be regarded as *travaux préparatoires* bearing on

¹⁵⁴ *Ibid.*

the word "equally" in the treaty of 1842, in the *correspondence* between Lord Ashburton and Mr. Webster. Although the Commission did not have to pass upon the admissibility of this extrinsic evidence in the matter of interpretation, the fact remains that this was the first case where such evidence has been even offered, and the Commission's not having had to pass upon it need not necessarily be construed as a definite non-acquiescence on its part. One favorable symptom that preparatory works, facts and circumstances may find place in the decisions of the Commission, is the independent opinion of Commissioner Powell, who has based a good part of his opinion on the historical facts and circumstances and the *travaux préparatoires* that culminated in the treaties of 1842 and 1909.

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CHAPTER V

THE ADMINISTRATIVE POWERS

THE administrative powers of the International Joint Commission are derived from the provisions of Article VI of the treaty of 1909.¹ These powers are confined to the two cross-boundary rivers—the Milk and the St. Mary—mentioned in the Article and do not extend to any other cross-boundary stream of water. The Preliminary Article of that treaty excludes “waters of rivers flowing across the boundary” from the province of the “boundary waters”, which are placed under the jurisdiction of the Commission. Nevertheless the important agricultural value and usefulness of the waters of the St. Mary and Milk rivers have persuaded the governments of the United States and Canada to place their equitable and beneficial administration under the supervision and direction of the International Joint Commission, subject to the terms and requirements of Article VI.

THE GEOGRAPHY OF THE MILK AND THE ST. MARY

a. The Milk River: This stream rises in the foothills of the Montana Mountains², and flows in a general easterly course not far from the international boundary, receiving most of its water supply from occasional showers and storms.³ The upper course of the river lies mainly to the north of the international line, in Canada, where it flows for

¹ Treaty of 1909, article vi. See *infra*, appendix A.

² *Papers of the I. J. C.*, p. 168.

³ *Hearings, St. Mary and Milk Rivers*, p. 11.

a distance of approximately 210 miles, during which it falls about seven feet per mile or about 1,475 feet for its entire length, and then bends in a southeast direction to cross the boundary line and flow easterly through the valley of Northern Montana,⁴ to empty eventually into the Missouri.

b. The St. Mary River: This river rises in the Rockies, in St. Mary's Lakes in the extreme northwest corner of the State of Montana. Then it runs due north, crosses the international boundary west of the fourth meridian, forming a junction with Belly River near Lethbridge in the Canadian Province of Alberta, and flows conjointly with the latter to the South Saskatchewan River.⁵

HISTORY OF ARTICLE VI

From 1891 onwards various engineering explorations and surveys have been made of the Milk River on the side of the United States, with a view to tapping its waters for beneficial purposes of one kind or another.⁶ These surveys had revealed the possibility that for adequately meeting the agricultural and irrigational demands of the people of the Milk River Valley in Montana, some practicable project could be undertaken by means of which "water could be taken out of the St. Mary River or Lake, carried along and across the divide, and either dropped into the North Fork of Milk River or carried on southerly into drainage lines which did not enter Canada".⁷ On June 17, 1902, the Congress of the United States passed "An act appropriating the receipts from the sale and disposal of public lands . . . for the construction of irrigation works and for the reclamation of arid

⁴ *Ibid.*, pp. 11-12.

⁵ *Ibid.*, p. 58; from the "Extract from a Report of the Privy Council" (Canada), October 27, 1902.

⁶ Sen. Doc., no. 41, part ii, 52nd Cong., 1st Sess.; *Hearings*, p. 14.

⁷ *Ibid.*

lands".⁸ While this act was under consideration before the Congress, the Senate Committee on Public Lands submitted a report⁹, along with a letter from the Director of the U. S. Geological survey¹⁰ dated January 25, 1902, dealing with the problem of diverting the waters of these rivers. On December 29, 1902, the U. S. Secretary of State communicated the matter to the British ambassador in Washington. Nothing important seems to have occurred between 1902 and 1904. In 1904 the Director of the U. S. Geological Survey wrote to the Secretary of the Interior stating that the people of the lower Milk River Valley had lodged a complaint that a certain canal, to be built on the Canadian side, would deprive them of their legitimate water supply and that therefore such necessary measures should be adopted as would prevent an invasion of their rights.¹¹ On October 13, 1904, the Secretary of State wrote to the British ambassador on the proposed diversion and stated that he would be very glad if, "in view of the vital importance of the matter to the citizens of Milk River Valley and the property of the United States, particularly the irrigation system on Fort Belknap Indian Reservation", the ambassador would, in the light of the Senate Committee's Report of which a copy was appended to the letter, exercise his "good offices" to "revive the matter with the Dominion Government, to the end that every possible means be taken to secure an equitable settlement of the questions involved and to conserve all the rights in the premises" of the government of the United States and the citizens of Montana.¹² Between 1904 and 1908 diplomatic negotiations continued.¹³

⁸ *Ibid.*, pp. 58, 61, 74; 32 Stat. 388.

⁹ Senate Report, no. 254, 57th Cong., 1st Sess.; *Hearings*, p. 74.

¹⁰ C. D. Walcott.

¹¹ *Hearings*, pp. 75-76.

¹² *Ibid.*, p. 76.

While matters moved in this way on the American side, important events had happened on the Canadian side of the line. From 1894 onwards the Canadian Government made several surveys¹⁴ and demonstrated that it was possible to irrigate a considerable tract of land in the southern regions of the province of Alberta. On Sept. 21, 1897, an Order in Council was issued which was designed to safeguard the future development of these regions.¹⁵ Soon afterwards the Alberta Irrigation Company⁶, which subsequently became the Canadian Northwest Irrigation Company, controlled by the Canadian Pacific Railroad Company under a third name of the Alberta Railway and Irrigation Company, applied to the Canadian government for the construction of an irrigation canal in southern Alberta. The government authorized the canal and extended its authorization to 1902. That year the United States passed the irrigation act, as elsewhere noted.¹⁷ Four months later Canada issued an Order in Council¹⁸ which was based upon a report of the committee of the Canadian Privy Council in which reference was made to the remonstrance of the Minister of the Interior for Canada against the United States act, which in his opinion proposed "to divert the waters of the St. Mary River into the channel of Milk River for the purpose of irrigating certain lands in Montana".¹⁹ He had also pointed out to the Privy Council Committee²⁰ that the greater length of the St. Mary's was in Canada, that that stream was being tapped

¹⁴ *Ibid.*, p. 57.

¹⁵ *Ibid.*

¹⁶ Organized 1898. *Hearings*, p. 64.

¹⁷ See 32 Stat. 388; *Hearings*, pp. 58, 61.

¹⁸ *Ibid.*, p. 58.

¹⁹ *Ibid.*, 32 Stat. 388, June 17, 1902.

²⁰ See extract from the Privy Council Committee report; *Hearings*, pp. 58-59.

about six miles north of the international boundary by the canal of the Northwest Irrigation Company²¹, and that this company had all its works completed and had "sold considerable land with a water right from the canal in question. The proposed diversion of the river (on the United States side) will render useless the greater part of the works constructed at a large expense" by the Canadian company, and "its revenues will be so affected that it will be unable to meet its obligations"; because if the lands which had been reclaimed since the construction of the canal were deprived of water, they would be no longer suitable for cultivation, and would therefore have to be abandoned.²² The Minister further informed the Privy Council Committee that: "The whole of the water now flowing in the St. Mary River is required for irrigating the lands in the vicinity of Lethbridge and the Canadian canal was constructed with a capacity sufficient for carrying this quantity of water".²³ He protested against the statement in the Report of the Committee of the United States Senate on Reclamation of Arid Lands, which indicated that "it is not considered practicable for the Canadians to divert water at any point in Canada from the South Fork or from Milk River".²⁴ The Minister submitted that the surveys conducted under his direction did not confirm the position taken by the United States Senate Committee's report or by the report of the hydrographer of the United States Geological Survey to the same effect, but that they (the surveys) proved that the then water supply of the Milk River and "any additional amount diverted therein from the St. Mary River south of the international boundary

²¹ *Hearings*, p. 59.

²² *Ibid.*

²³ *Ibid.*, see report no. 254, Senate Committee on Reclamation of Arid Land, 57th Cong., 1st Sess.

²⁴ *Ibid.*

can be taken out in Canada at a moderate cost and prevented from flowing again into the United States".²⁵

On January 6, 1903, the British ambassador, upon the request of the Governor-General of Canada represented the matter to the United States Secretary of State²⁶ who, in the meantime, had informed the British embassy of the proposed project on the United States side to divert the waters of the St. Mary River in Montana eastward into the Milk River. His Excellency, in reply to the Secretary's note,²⁷ expressed his "regret at the contents of this communication, especially in view of the consideration which was shown in the analogous case of the complaint of certain inhabitants of Idaho against the action of the Canadian Dyking Company in damming the waters of Boundary Creek in 1897",²⁸ and requested that such action be taken by the United States as had been asked of Canada in the former controversy. On February 19, 1903, John Hay, then United States Secretary of State, replied that the Boundary Creek controversy "remained under consideration from April 1895, until some time in 1899, and the Interior Department is not advised whether the matter has yet been settled".²⁹

On December 30, 1904³⁰, Mr. Hay again started negotiations with the British Embassy on the question of the diversion on the Canadian side by the Alberta Railway and Irrigation Company's canal. This move was made because the people of the Milk River Valley in Montana, as elsewhere observed, had requested their government to take appropriate measures to check an alleged invasion of their rights to the

²⁵ *Ibid.*

²⁶ *Hearings*, p. 60.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*, pp. 62-63.

water supply of the Milk River. The Secretary's despatch, therefore, pointed out that the waters of the Milk River rose largely in the United States and after their flow through Canada and return to the south side of the boundary, they were appropriated and put to "beneficial use by the inhabitants of the Milk River Valley long prior to any diversion of that river in Canada. Under the laws and customs which have grown up in the arid regions, and which are in force in Canada, priority of appropriation and use has been recognized." The Secretary further called the attention of the ambassador to the fact that if the Canadian corporation were allowed to divert the waters in question in Canada, for every acre of land irrigated on the Canadian side, one or more acres might correspondingly be destroyed on the American side.³¹ "For the Canadian Government to permit such diversion of the waters of Milk River in Canadian territory, would therefore appear to be an act lacking in friendliness."³² In the same communication, however, the Secretary indicated that the engineers attached to the United States Reclamation Service believed it possible "for the two Governments to make an arrangement whereby the rights of the settlers within the domain of the United States will be preserved and at the same time the water necessary to supply the canal built by the Canadian Northwest Irrigation Co. will be provided".³³ The engineers of the United States Reclamation Service entertained this belief upon the ground that the waters of the St. Mary's River which flow northerly into Canada were then used only to a very limited extent and therefore it was practicable to store those waters in the United States, conduct them by a canal on the American side, i. e. south of the boundary line, to the head of the Milk River

³¹ *Ibid.*, p. 63.

³² *Ibid.*

³³ *Ibid.*

and there empty them into that river; by that process the usual flow of that stream would be increased to such an extent as to supply the lands in the Milk River valley and at the same time protect "the prior rights of the Canadian settlers on the St. Marys River" by permitting its ordinary flow to continue to pass into Canadian territory".³⁴ If this scheme was adopted, the engineers believed that the great volume of floodwater which goes down the river destroying property on either bank would be checked within the United States and diverted to the headwaters of the Milk River and be applied to beneficial use in the lower Milk River Valley in the United States.³⁵ Outlining all these and other facts, Mr. Hay suggested to the British Embassy the calling of a "conference between representatives" of the two governments in order to reach "an agreement in respect to the disposition of the waters of Milk and St. Mary's Rivers".³⁶

The British Embassy notified the Dominion Government of the above correspondence on June 2, 1905, and on June 7th an Order in Council was issued by which the British Ambassador in Washington was authorized "to invite the United States Government to suggest such a plan for the settlement of all questions in reference to the waters of the St. Marys and Milk Rivers as would be acceptable to both countries".³⁷ During the course of the year, however, the International Waterways Commission was created, and took up the problem.³⁸

On November 15, 1906, the Waterways Commission submitted a "Progress Report" in which it pointed out that as questions involving the same principles and difficulties

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 64.

³⁸ See *supra*, chap. ii.

were liable to create friction, hostile feelings, and reprisals between the two countries "affecting waters on or crossing the boundary line, the commission would recommend that a treaty be entered into which shall settle the rules and principles upon which all such questions may be peacefully and satisfactorily determined as they arise".³⁹ No action seems to have materialized as a sequence to this recommendation. The Canadian section of the Waterways Commission, however, reported in January, 1907, that "fears have been expressed" that the proposed diversion of the St. Mary's water by the Reclamation schemes of the United States, to irrigate lands chiefly situate in the lower Milk River Valley "may prejudicially affect the present settlements on the Alberta Railway & Irrigation Co.'s land in Canada, or the future development, which may, in the natural course of things, be expected in that region",⁴⁰ and that the diplomatic exchanges between the two governments had not established as yet a basis for a satisfactory arrangement of the question.⁴¹

Meanwhile Mr. Elihu Root, as Secretary of State for the United States, with the cooperation of certain officials⁴² of the Reclamation Service, formulated fourteen points "with a view to bringing to a determination the questions so long discussed relating to the use of the waters of St. Mary River and the Milk River", and communicated them to the British Embassy on June 15, 1907.⁴³ These points briefly were:⁴⁴

1. For the purpose of an agreement, both the St. Mary and the Milk Rivers, "which are now separate and inde-

³⁹ *Progress Report of the International Waterways Commission*, 1906, vol. ii, p. 131; *Hearings*, p. 68.

⁴⁰ *Hearings*, p. 65.

⁴¹ *Ibid.*

⁴² *Ibid.*, p. 67.

⁴³ *Ibid.*, p. 65.

⁴⁴ *Ibid.*, pp. 65-67.

pendent river systems shall be treated as though they were the waterways of a single drainage system ”.

2. These waters shall be apportioned to each country from March 1st to September 30th, “ from day to day in equal amounts ”.

3. Failure to utilize the water by any one country shall neither add to nor diminish “ the rights of the other country ”.

4. During the periods other than those mentioned under condition no. 2 above, the United States may divert or hold back in storage reservoirs any portion of the natural flow of St. Mary's River, and Canada may do the same with the natural flow of the Milk River, in neither case interfering with existing rights.

5. Certain special items of apportionment were to be created specially during the period mentioned in no. 2 above.

6. The total quantity of water to which each country shall be entitled according to the terms of provision 5 “ shall be maintained at equal amounts, as nearly as possible ”.

7. The amounts of water chargeable to each country under provision 5, should “ include all the waters of the two river systems whether used directly or indirectly by the two Governments or by private parties in their respective territories ”.

8. “ Canada shall in no event divert from the Milk River any portion of the stored St. Marys River water turned into the Milk River system by the United States . . . ”.

9. In any event the share of the United States shall “ include so much of the available natural flow of the Milk River as shall be judicially determined as having been applied to beneficial use on or before November 1, 1905, by the canal systems taking water from the lower Milk River in Montana . . . ”.

10. The same rule applies to Canada as far as the St. Marys River is concerned.

11. The phrase "natural flow" should mean "the flow of the river system in question which would pass the point or points specified if no artificial structure had been placed in the stream channel and if no water had been diverted from or turned into it. Such natural flow shall be determined by the commission . . ." provided for in paragraph 14.

12. This agreement is to be the "full settlement of all existing and future claims of both countries to these waters".

13. The United States "shall not be liable for damages of any kind resulting from high water stages or floods of Milk River, whether occurring at times when water from St. Marys is being carried into Milk River or not".

14. The division of the waters is to be done under the supervision of a commission, one member to be appointed by the President of the United States and one member to be appointed by the Governor General of Canada. This Commission should have power to make appropriate rules and regulations to carry out the objects of the agreement. "In all cases of failure . . . to agree upon any matters which it is authorized to decide the members shall be empowered to select a third member and for the purpose of deciding the points of disagreement the commission shall consist of the three said members".

Upon receipt of these fourteen points and their reference to the Minister of the Interior of Canada, he suggested that "it would have been far preferable" to have the question of the equitable apportionment of the waters, as well as similar questions, dealt with "on the lines suggested by the report of the international waterways commission".⁴⁵ Then, referring to the terms of the proposed Root agreement, the Minister reported that it provided for the carrying of "a very large volume of water by the channel of the

⁴⁵ *Hearings*, p. 67.

Milk River, in Canada", all of which water should have to be allowed to pass through to the United States, "while the Canadian use is restricted to a part only of the natural flow which in the low water period is very small. It is felt that the concession asked from Canada in this regard is a very great one . . .⁴⁶ He also indicated that the division of these waters in conformity with the Root proposals would result in Canada's receiving a lesser share than is equitably due her, "although the rights given to the United States over the waters of St. Marys River are, in terms, balanced by rights given to Canada with respect to Milk River, the latter river is by no means equal in volume of constancy of flow to St. Marys River."⁴⁷ In view of this report of the Minister, the Committee of the Privy Council suggested the appointment of "a representative to confer with a representative" of the United States and consider "a basis of agreement which may be submitted to their respective Governments".⁴⁸

In response to this notification the United States government⁴⁹ notified the British Embassy that "Mr. F. H. Newell, the Director of the Reclamation Service has been designated to meet the representative" of Canada to confer on the various issues.⁵⁰ The ambassador notified the American Government that "Mr. W. F. King, Chief Astronomer of the Dominion, has been appointed the representative of the Canadian Government" for the same purpose.⁵¹ Between these men a series of draft proposals and correspondence passed⁵² which gave a certain shape to

⁴⁶ *Ibid.*, pp. 67-68.

⁴⁷ *Ibid.*, p. 68.

⁴⁸ *Ibid.*

⁴⁹ Through Mr. Root, Secretary of State.

⁵⁰ *Hearings*, p. 77.

⁵¹ *Ibid.*

Article VI of the treaty of 1909, but before it found its place in that treaty, several telegraphic exchanges⁵³ took place between Sir George C. Gibbons, member of the Waterways Commission, and Mr. Chandler P. Anderson, special counsel for the United States Department of State, regarding changes that had to be effected in the language of not only Article VI, but of practically all the other provisions of the treaty.⁵⁴ The Article, finally, was incorporated as the sixth in the treaty of January 11, 1909.

Article VI reads:

The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow. The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River. The provisions of Article II of this treaty shall apply to any injury resulting to

⁵² See *ibid.*, pp. 81-95.

⁵³ *Ibid.*, pp. 95-99.

⁵⁴ See *ibid.*

property in Canada from the conveyance of such waters through the Milk River.

The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty under the direction of the International Joint Commission.

By virtue of the last paragraph of this Article the Commission appointed two of its members, Commissioners Gardner (United States) and Powell (Canada) as a special committee⁵⁵ to investigate and report upon the conditions surrounding the St. Mary and Milk Rivers. This committee visited southern Alberta and the State of Montana, the two territorial divisions primarily interested in these rivers, as well as the irrigation works both public and private which would be involved in any consideration of the apportionment of the waters. In its report the committee submitted that in its opinion irrigation was a very vital matter to the Province of Alberta to the north of the international boundary and the State of Montana to the south, i. e. to the valley of the Milk River. But the committee pointed out that there was considerable difficulty in the minds of people on both sides of the boundary as regarded the meaning of the phrase "or so much of such amount as constitutes three-fourths of its natural flow", as it occurs in the Article, because some interested parties thought that the two countries were entitled to "an absolute preference in the respective rivers up to 500 second-feet, and then, in addition, were also entitled to three-fourths of the flow where such three-fourths exceeded 500 second-feet".⁵⁶ There were also other constructions which suggested themselves to the committee, and in consequence its report expressed the opinion that the "first step" for the

⁵⁵ *Ibid.*, p. 5.

⁵⁶ *Ibid.*

Joint Commission to take was to "have a hearing of the parties interested with a view of determining the correct construction to be placed upon the words of Article VI".⁵⁷ The committee further submitted that at the time of its visit there was not 500 second-feet of flow in the St. Mary⁵⁸ that the localities where the measurements of the two rivers should take place would have to be ascertained,⁵⁹ and that the responsibility of securing an equitable apportionment of the waters to the countries concerned should be entrusted to a "joint-board, consisting of two competent persons, one to be appointed by the United States and one by Canada". The Gardner-Powell Committee made its report on October 6, 1914.⁶⁰

As a result of this report the International Joint Commission called a hearing of the parties, public as well as private, at St. Paul, Minnesota, on May 24-28, 1915. This was the first hearing; the second was held at Detroit on May 15-17, 1917; a reargument at Ottawa on May 3-5, 1920, and a final session in Chinook, Montana, and Lethbridge, Alberta, September 10 and 17, 1921.⁶¹ On the whole it was a very protracted controversy that involved several important issues, primarily the interpretation of Article VI.

I. Interests on the American side

During the hearings at St. Paul Mr. Wyvell represented the Government of the United States. He submitted that the position of his government was that Article VI dealt with only international waters, that is, "waters which originate in one country and which either flow, or, if not interfered

⁵⁷ *Ibid.*, p. 6.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Order (Washington, 1923), p. 2.

with, would flow, across the boundary line into the other ".⁶² The first two sentences of Article VI, according to him, enunciated certain "general principles of equality and division, the object being to secure a more beneficial use of the international waters". These sentences moreover provided the maximum amount of water which each country was to have "whenever in the remote future the plans of either country are developed so that this maximum amount can actually be applied to beneficial use".⁶³ A similar position was taken also by Mr. Newell of the United States Reclamation Service.⁶⁴ To support his position Mr. Wyvell entered into the diplomatic negotiations that preceded the treaty between the years 1902 and 1909. These protracted exchanges clearly show the difficulties which had to be overcome before Article VI of the treaty could be formulated.

Counsel for the Water Users of the Milk River Valley in Montana, Mr. W. B. Sands, substantiated Mr. Wyvell's position, stating that the understanding of the people whom he represented was that prior to the treaty and "up to within a few months", the treaty concerned only "such waters as flow across the international boundary and it came with great surprise that the Canadians expected to include in a division any portion of the waters which arise in the United States and do not flow across the line".⁶⁵ He contended that the testimony⁶⁶ had sufficiently proved that the United States produced 80% of the waters that flowed across the boundary line, of which "by the terms of this treaty" the United States was giving 58% to the Canadians and therefore

⁶² *Hearings*, p. 72.

⁶³ *Ibid.*, p. 73.

⁶⁴ *Ibid.*, p. 20.

⁶⁵ *Hearings*, p. 215.

⁶⁶ *Ibid.*, pp. 120, 121, testimony of Mr. R. J. Burley, Irrigation Engineer of the Dominion Gov't.; see *Hearings*, p. 101.

that percentage ought to be all that Canada could ask. He maintained that the phrase "in the State of Montana and the Provinces of Alberta and Saskatchewan" as incorporated in Article VI meant only the "international waters that cross the boundary".⁶⁷ Mr. Sands raised a third point, that the treaty power of the United States "would not have the right . . . to take away from us [the people of the Milk River Valley] . . . rights which do not affect international questions".⁶⁸ "The treaty Power of the United States does not extend to waters that rise wholly within the state of Montana and remain within the State"; the waters are not even interstate waters, and in Mr. Sands' view, "the nation has no right to deal with them".⁶⁹ In support of this position he pointed to the "after conduct of the people of the United States" in spending three million dollars to convey the waters of the St. Mary River into the basin of the Milk River as being the "strongest proof of their construction of the language of the treaty. We have already spent \$5,000,000 in preparing to use the waters of the St. Mary River. If the construction maintained by the Canadians is accepted . . . that expenditure would be almost a total loss. . . ." ⁷⁰

At the hearings, the United States Reclamation Service had been represented by Mr. Morris Bien. He also maintained that Article VI related to "only the waters that would cross the boundary".⁷¹ He seems to have arrived at this position upon the argument that there was "a vast difference between the use of the word 'and' and the use of the word 'or' " in the phrase in question ["in the State of Mon-

⁶⁷ *Ibid.*, pp. 225, 259, 262.

⁶⁸ *Ibid.*, p. 225.

⁶⁹ *Ibid.*, pp. 228, 263, and p. 380 onwards, cited chiefly from Henry St. George Tucker, *Limitations on the Treaty Making Power*.

⁷⁰ *Hearings*, p. 277.

⁷¹ *Ibid.*, pp. 249-250.

tana and the Provinces of Alberta and Saskatchewan"]. If the word "or" were substituted instead of "and", it would be "practically the same as the entire omission of the paragraph".⁷² In other words, as Mr. Wyvell appears to have interpreted it, Mr. Bien's contention was that "all the tributaries being in the State of Montana and the Provinces of Alberta and Saskatchewan anyway, there would be no use for the phrase if they intended to include all those tributaries".⁷³

II. Interests on the Canadian side

The Dominion Government had its representative at St. Paul in the person of Council MacInnes, who took objection to the fact that the American case placed reliance on "material extraneous to the language of the article itself, with the single exception that the words inclosed within the brackets had the effect of limiting the language to waters of streams in Montana, Alberta, and Saskatchewan".⁷⁴ This was a reference apparently to the position of Mr. Bien. Then referring to the positions of Messrs. Wyvell and Newell, the counsel submitted that "there are and can be, for geographical reasons, no waters which flow through Montana and Alberta and Saskatchewan. The contentions, therefore, . . . are contended for by material outside of the language of the treaty itself."⁷⁵

Counsel for the government of the province of Alberta, Mr. John D. Hunt, did not make any special issue except to express the hope that the province would get a fair share in the apportionment of the waters. Mr. William Pearce, appearing as an official on behalf of the Western Canadian Irrigation Association as well as the Cyprus Hills Water As-

⁷² *Ibid.*, see his exposition on this point, pp. 244-257.

⁷³ *Ibid.*, p. 249.

⁷⁴ *Ibid.*, p. 279.

⁷⁵ *Ibid.*

sociation, indicated that in Canada, unlike the situation in the United States, there was "no Government irrigation at all".⁷⁶ This meant only that the irrigation developments in the western regions of Canada were "dependent altogether upon private enterprises and in that respect" differed from the Reclamation Service of the United States.⁷⁷

AT DETROIT ⁷⁸

The United States Reclamation Service was represented by Mr. Will R. King, who started with the question of treaty interpretation in the light of extrinsic evidence. According to him "all authorities concur in holding . . . that the settled 'rules of construction' applicable to private contracts, including the rules governing the admission of extrinsic evidence in the determination of the intent of the parties, with equal force apply to treaties between nations".⁷⁹ In support of this contention, Mr. King cited the rule as laid down in Chancellor Kent's commentaries,⁸⁰ where it is stated that treaties when properly made should "receive a *fair and liberal interpretation* according to the *intention* of the contracting parties. . . . Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."⁸¹ Mr. King then referred to several decisions,⁸² and cited various authorities in further support of his position that where

⁷⁶ *Ibid.*, p. 189.

⁷⁷ *Ibid.* The hearing closed at St. Paul, Minn., on May 28, 1915.

⁷⁸ Supplemental Argument, May 15-17, 1917.

⁷⁹ Supplemental Argument (1917), pp. 8-9.

⁸⁰ Quoted in *ibid.*, p. 9.

⁸¹ Kent, *Commentaries*, vol. i, p. 174.

⁸² Supplemental Argument, pp. 8-11; also see Cooley, *Constitutional Limitation*, p. 91, and cases cited on p. 9: *Tucker v. Alexandroff*, 183 U. S. 424, 437; *United States v. Arrendondo*, 6 Pet., 691, 710; *United States v. D'Auterive*, 10 How., 609, 622.

there was "latent ambiguity", as seemed to be the case as regards the phrase in Article VI, the Commission had the "duty . . . to take into consideration all the correspondence and everything else that led up to the formation of the treaty".⁸³ Here also he cited several cases,⁸⁴ and maintained that "if a tributary is in Alberta *and* Montana or if it is in Saskatchewan *and* Montana or Saskatchewan *and* Alberta or in either, *and* flows across the line . . . such tributary or tributaries must be taken into consideration. . . . That was what the parties had in mind at the time . . . of the treaty".⁸⁵ At that time the United States acted "as a quasi-agent for the citizens of Montana" in appropriating 200,000 acres of land which had to be irrigated by the waters to be brought for a distance of 10 miles through Canada from the St. Mary River and emptied into the Milk, and eventually conserved in a reservoir below the boundary line.⁸⁶

Senator Walsh of Montana who appeared on behalf of his state, also took the the position that the tributaries in question were only such as crossed the boundary. In other words he added weight to the contention of Mr. King, while he cited several authorities on the admissibility of "preparatory work" as justifiable in the consideration of the interpretation of the disputed passage in Article VI.⁸⁷

⁸³ Supplemental Argument, p. 13.

⁸⁴ *Ibid.*, p. 23, citing cases: *Merchants & Farmers' Bank v. McKellar* (11 So. 592, 596); *Commonwealth v. Kilgore* (82 Pac. 396, 398); *James v. U. S. Fidelity Co.* (117 S. W. 406, 409, 410); *Dumont v. The United States* (98 U. S. 143); *Miller v. Jones* (80 Ala. 89, 95); *In re Steinruck's Insolvency* (74 Atl. 360) also see (225 Pa. 461).

⁸⁵ Supplemental Argument, p. 24.

⁸⁶ *Ibid.*, p. 8.

⁸⁷ *Ibid.*, pp. 68-110, citing *American Encyclopedia of Law and Procedure*, p. 969 of 38 Cyc.; *United States v. Bethlehem Steel Co.*, 205 U. S. 105; *Simpson v. The United States*, 199 U. S. 397-399; *Brawley v. The United States*, 96 U. S. 168-173; *Birch and another v. Depeyster*, 1 Starkie 210; Crandall, *Treaties*, sec. 164.

THE POSITION OF COUNSEL FOR THE CANADIAN GOVERNMENT

Mr. MacInnes in reply to the contentions of Messrs. King and Walsh made his submission that Article VI "is a treaty within a treaty",⁸⁸ i. e. the treaty of 1909; that it was not ambiguous,⁸⁹ and that the diplomatic correspondence and drafts, briefly, the "*travaux préparatoires*" in question, sufficiently illustrated that they were not acceptable to the two countries because of the unsatisfactory language in which they had been drawn up⁹⁰—in short that article VI contemplated "all of the waters of the St. Mary River and Milk River and their tributaries".⁹¹ He also quoted authorities to maintain his position that the treaty power of the United States was binding upon the State of Monana in reference to Article VI.⁹²

When the hearing was closed at Detroit, counsel for the United States Government requested further time for an argument so that the Attorney-General of the United States might be able to study the case and submit his views. On October 15, 1917, the Attorney General wrote to the Commission that a further discussion was necessary.⁹³ On November 7 of the same year, however, the Secretary of State wrote the Commission stating that "whatever conclusion was reached by the Commission in the St. Mary and Milk River matter would not be regarded by his Government as

⁸⁸ *Ibid.*, p. 118.

⁸⁹ *Ibid.*, p. 119.

⁹⁰ *Ibid.*, p. 125.

⁹¹ *Ibid.*, p. 121.

⁹² *Hearings*, p. 139; also see 1915 *Hearings*, p. 228; *Howenstein v. Lynham* (100 U. S. 483); *Supplemental Argument*, p. 145; citing *Little v. Watson*, 32 Maine 214 (1850); *Crandall, op. cit.*, p. 223; *Butler*, vol. ii, p. 293; on pp. 147-148 citing *Anderson v. Dunn*, 6 Wheat. 204; *Storey, Joseph, Commentaries on the Constitution*, Boston, 1883, p. 304, sec. 425.

⁹³ *Ottawa Hearings*, 1920, p. 4.

binding upon it in so far as it undertook to interpret Article VI".⁹⁴ The Commission sent a reply to this note on February 4, 1918; meanwhile, it had forwarded the American Secretary's note to the Canadian Government through the British Embassy in Washington, D. C. On March 11, 1918, the Dominion Government enacted an Order in Council embodying its view regarding the Commission's right to interpret Article VI. In the following year, November 11, 1919, the American Secretary wrote to the Commission explaining his previous letter of November 7, 1917, and indicated that his intention "was to reserve so far as the United States Government was concerned, any question of international right that might be involved, but that his Government had no intention to preclude the Commission from exercising its functions as a purely administrative body in determining what waters it should under Article VI measure and apportion".⁹⁵

While these negotiations were going on the Commission lost two of its members,⁹⁶ and further delay occurred in settling the dispute. In March, 1920, the Chairman of the United States section of the Commission wired to the chairman of the Canadian section that Senator Clark who had been appointed to the vacancy created by the death of Mr. Tawney, would desire to have a reargument; consequently the Commission met at Ottawa, May 3-5, 1920.⁹⁷

At the reargument at Ottawa Mr. George Turner appeared on behalf of the United States, while Mr. MacInnes for the Dominion Government submitted a brief. Mr. Turner's po-

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, remarks of Commissioner Magrath.

⁹⁶ Mr. Mignault resigned to be appointed to the Supreme Court of Canada in October, 1918; Mr. Tawney (U. S.) died in June, 1919.

⁹⁷ *Hearings*, Ottawa, 1920, p. 5; Governor Glenn (U. S.) was suffering from lumbago and did not attend this session.

sition was that "in construing Article VI, the Commission is simply reading its mandate" and in so doing it was "acting in a ministerial capacity". According to him it was

familiar law in the United States, in England, and in Canada as well that an administrative officer or body shall be kept within the bounds of his mandate by a writ of mandamus and in proper cases by injunctions. Inasmuch as both the processes are attacking the action of a commission collaterally, it cannot be that in reading its mandate, however difficult that may be, it is proceeding in a judicial capacity; because it is equally familiar law in all three countries that we can only attack a judicial decision directly—that is by appeal, writ of error, or in case of inferior judicial tribunals and boards exercising a quasi-judicial power, by the writ of certiorari. . . . In short an administrative officer or body is compelled to construe to itself and for itself what it is that the law requires it to do. . . .⁹⁸

After the Ottawa hearing, there were two more sessions of the Commission on this dispute, one at Chinook, Montana, on September 15, 1921, and the other at Lethbridge, Alberta, on the seventeenth of the same month, at which the Commission heard the views of the water-users and others interested in the disposition of the waters of the St. Mary and Milk Rivers.

THE ORDER OF THE COMMISSION

On October 4, 1921, the International Joint Commission issued its order regarding the measurement and apportionment of the waters of the St. Mary and Milk Rivers. To this end the Commission decreed that in pursuance of the powers conferred on it by Article VI, the Reclamation officers of the United States and the Irrigation officers of Canada "shall, until this order is varied, or modified, or withdrawn by the Commission, make jointly the measurement

⁹⁸ *Ibid.*, pp. 42-43.

and apportionment of the water to be used by the United States and Canada in accordance with the following rules ”:

1. The St. Mary River.

a. During the irrigation season when the natural flow of this stream is six hundred and sixty-six cubic feet per second or less, at the point where the St. Mary crosses the international boundary, Canada shall have three-fourths and the United States the remaining one-fourth.

b. If the natural flow during this season exceeds six hundred and sixty-six cubic feet per second, Canada shall have “ a prior appropriation of five hundred (500) cubic feet per second and the excess over six-hundred and sixty-six cubic feet shall be divided equally between the two countries ”.

c. During other seasons the natural flow at the point mentioned above “ shall be divided equally between the two countries ”.⁹⁹

2. The Milk River.

a. The point where the Milk River crosses the international boundary “ for the last time ” is to be known as the Eastern Crossing. At this locality, if the natural flow of the river is, or is less than, six hundred and sixty-six cubic feet per second, “ the United States shall be entitled to three-fourths ” of such flow, during the season of irrigation, and Canada to the remaining one-fourth.

b. If however the flow exceeds the above specified feet at the Eastern Crossing, then the United States shall have a prior appropriation of 500 cubic feet per second whilst the excess over the standard six hundred and sixty-six cubic feet shall be equally apportioned between the United States and Canada.

c. In non-irrigation seasons the natural flow at the East-

⁹⁹ Order, p. 3, Washington, 1923.

ern Crossing shall be equally divided between the two countries.¹⁰⁰

3. *Milk River Tributaries.*

Where the Saskatchewan or northern tributaries of the Milk River cross the boundary line, their waters "shall be divided equally between the two countries".¹⁰¹

4. *Waters not naturally crossing the boundary.*

"Each country shall be apportioned such waters of the said rivers and of any tributaries thereof as rise in that country but do not naturally flow across the international boundary." Here it seems, whether the Commission decided this point after carefully studying the extrinsic evidence offered in the case or not, the position of the United States was sustained in the sense that only such tributaries as naturally flow across the boundary were considered as coming under the jurisdiction of the Commission.

5. The fifth rule of the order enunciated certain administrative rules and regulations for the Reclamation and Irrigation officers to observe:

a. These officers are to "keep a daily record of the natural flow" of the St. Mary and Milk Rivers as well as of the Saskatchewan tributaries of the latter river, at their specified crossings on the international boundary. This record is to be obtained "by measurement in each case" at:

- (1) the gauging station at the international boundary
- (2) "all places where any of the waters which would naturally flow across the international boundary at that particular point are diverted in either country prior to such crossing".

¹⁰¹ *Ibid.*

¹⁰⁰ *Ibid.*

(3) all places where any of the waters "at that particular point are stored, or the natural flow thereof increased or decreased prior to such crossing".

b. These officers are to fix the amount of water due to each country under the directions mentioned in rules, 1, 2, and 3 above.

c. They are to communicate the amount so fixed to all interested parties.

6. The sixth rule allows each country to establish gauging stations at certain points.

7. Rule seven provides for certain international gauging stations.

8. Rule eight provides further regulations for the officers with a view to facilitating satisfactory conditions for the operation of irrigation works as well as to report to the Commission the measurements made at all gauging stations, international as well as otherwise.

9. Rule nine decrees that in the event of any disagreement among the officers in question as to anything under the order of the Commission, "the said Reclamation and Irrigation Officers shall report to the Commission, setting forth fully the points of difference and the facts relating thereto".¹⁰²

Thus the administrative powers of the Commission consist in its authority to enunciate rules and principles for the direction of the Reclamation and Irrigation officers of the two countries, who, to all intents and purposes, act as a board of control under the supervision of and responsibility to the Commission, although the Commission does not possess any powers of appointing, paying or discharging these officers. Such powers are not delegated by the treaty. Nevertheless

¹⁰² Order, p. 4. There was a tenth paragraph in the order which referred to the withdrawal of an interim order dated April 6, 1921, which the Commission had issued with respect to the measuring and apportioning of the waters of the St. Mary and Milk rivers.

whatever administrative authority the Commission is competent to exercise under Article VI, such authority should be regarded as of great consequence to the two countries concerned, because in its "Recommendations" the Commission made it abundantly clear that it is of the "utmost importance, not only because of the practical benefits to accrue to the people of this western country but still more because the St. Mary and Milk Rivers problem is one that might easily become a source of serious irritation and misunderstanding to the people of the two countries, that every effort should be made to obtain the maximum efficiency in irrigation" from the waters of the St. Mary and Milk Rivers.¹⁰³

Before concluding this chapter it may be perhaps informative to take a bird's eye view of the Commission's impressions which were embodied in its "Recommendations". The first point the Commission makes is that after "a very thorough investigation" of the irrigation possibilities in such sections of Montana, Alberta and Saskatchewan as depend on the St. Mary and Milk Rivers, the Commission has concluded "that the quantities of land in this international region susceptible of development far exceed the capacity of the rivers in question even under the most exhaustive system of conservation".¹⁰⁴ Consequently the Commission recommended that no stone should be left unturned to eke out the best results from the irrigation works of these waters.

Then the Commission referred to the various existing and prospective irrigation projects of the United States and Canadian Reclamation services,¹⁰⁵ chiefly to the dam contemplated by the United States Reclamation Service across the outlet of the St. Mary Lakes, and recommended that in view of the international interests involved and as an expression

¹⁰³ *Ibid.*, pp. 5-6, recommendations.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

of the neighborly relations and "good fellowship which it is convinced the people of both countries have earnestly at heart", the cost of constructing the reservoir at the outlet of St. Mary Lakes, without being charged against any particular project, "should be borne jointly by the Governments of the United States and Canada, the legal title of said reservoir to be vested in the United States".¹⁰⁶ With this hope the Commission further recommended that the two countries enter into an agreement for the construction of a reservoir at St. Mary Lakes¹⁰⁷ in Montana, that both the United States and Canadian reclamation services proceed with their contemplated projects in Montana and Alberta respectively, and that all these constructions be carried out in the manner set forth by the Commission.

In concluding this chapter certain observations may be pertinently made. The first refers to the position which the United States took in 1917, informing the Commission that "whatever conclusion" the Commission reached on the St. Mary and Milk River matter "would not be regarded" by the Government of the United States "as binding upon it so far as it undertook to interpret Article VI".¹⁰⁸ The purpose of this note to the Commission was revealed two years later as being "to reserve so far as the United States Government was concerned any questions of international right that might be involved".¹⁰⁹ Unfortunately the various letters that passed between the United States Government and the Joint Commission are not published; nevertheless a personal opinion may pardonably be ventured upon what is

¹⁰⁶ *Ibid.*, p. 6.

¹⁰⁷ For storing 250,000 acre feet of water by means of a dam at the outlet of the St. Mary Lakes. See U. S. Reclamation Service, *First Annual Report*, 1902.

¹⁰⁸ See *supra*, p. 229.

¹⁰⁹ *Ibid.*

at present available in print on the St. Mary and Milk Rivers case.

Even a casual reading of Article VI of the treaty of 1909, which may for all intents and purposes be regarded as the mandate under which the Joint Commission acts, conveys the impression that the only duty the Commission may perform under that article is one of giving "direction" to the Reclamation and Irrigation Officers for the "measurement and apportionment" of the waters of the St. Mary and Milk Rivers. Measurement and apportionment of waters seem to be a technical or engineering function; at best it appears to be an administrative or quasi-judicial task in so far as it involves the drafting of rules and regulations which should not be subversive of the legitimate rights of the contracting parties, but should safeguard them by an equitable apportionment of the waters in question. But even admitting that the Commission has a quasi-judicial authority under Article VI, still it would appear hard to maintain that under such authority it may interpret the article and establish the legitimate rights of either the United States or Canada; because that article does not invest any judicial powers in the Commission so as to enable it to construe or interpret that article. According to Wharton: "Construction of treaties is a matter of law, to be governed by the same rules *mutatis mutandis*, as prevail in the construction of contracts and statutes."¹¹⁰ In the case of *Jones v. Meehan* the United States Supreme Court held that: "The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."¹¹¹ If this is the

¹¹⁰ Quoted in Moore, *op. cit.*, vol. 5, p. 252.

¹¹¹ 175 U. S. 32 (1899), cited in Moore, *op. cit.*, vol. v, p. 234, also notes on *Wilson v. Wall*, 6 Wallace, 83, 89; *Smith v. Stevens*, 10 Wallace 321, 327; *Holden v. Joy*, 17 Wallace 211, 247.

judicial position in the United States on a question of construction or interpretation of treaties, it seems to follow that by the terms of the restricted Article VI, the United States has not transferred to the Joint Commission any power to pronounce upon its rights in the St. Mary and Milk River matter in such a way as to render such a pronouncement binding upon herself. Consequently the position taken by the United States Government in 1917 seems to be appropriate, especially in view of the fact that the object of assuming such a position was to safeguard "any questions of international right".

The second observation is that under Article VI the Commission appears to fulfil a quasi-judicial role because the regulations which the Commission established for the purpose of guiding the appropriate Reclamation and Irrigation Officers of the two countries in the matter of apportioning the waters of the St. Mary and Milk Rivers had to be drafted in the light of the first paragraph of Article VI, which seems to contain an enunciation of the legal right of the contracting parties as far as such apportionment was concerned. That paragraph says that the waters "shall be apportioned equally between the two countries". Consequently this responsibility of protecting a legal right through certain administrative functions, such as measuring, apportioning, and providing rules and regulations thereto, may be regarded as a quasi-judicial function.

This duty appears to be different from the judicial powers of the Commission under Articles III, IV, and VIII. Under these articles the Commission may render decisions on applications, whether they be public or private in character, and such decisions, as observed in a previous chapter, would be binding on all parties concerned. Under Article VI, on the other hand, the Commission does not seem to be competent to render any decision at all. The governments have

not agreed that they might not authorize the use, obstruction or diversion of the waters of the St. Mary and Milk Rivers without "the approval of the Commission", as they seem to have done in relation to other waters under Articles III, IV and VIII. Under these circumstances it may be perhaps satisfactory to regard the powers of the Commission as partly judicial and partly technical, or quasi-judicial. Even the term "administrative" may be sufficient if administrative functions seem, as a rule, to have certain judicial aspects.

CHAPTER VI

INVESTIGATIVE POWERS

IF there are any questions arising on the international boundary other than those that are provided for under Articles III, IV and VIII of the treaty of 1909, such questions would appear to have been covered by the provisions of Article IX of that treaty. But it should be noted that under Article IX the Joint Commission is not competent to exercise any judicial authority as under Articles III, IV and VIII. The power delegated to the Commission under Article IX is one of investigating, reporting and recommending on the various questions the High Contracting Parties may refer to it from time to time.

Article IX reads:

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions

which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.¹

From the language of this article it is clear that within the geographically restricted sphere of "the common frontier" the Commission may be called upon by the two governments to examine questions of law or fact involved in any dispute or problem; because the terms "rights" and "obligations" seem to connote legal questions, and may arise from existing treaties or recognized principles of international law, while the word "interests" may refer to those matters which may be settled through international comity—*ex aequo et bono*—or through such non-legal but nevertheless desirable methods of good neighborliness.

REFERENCE UNDER ARTICLE IX

During the hearings on the application of the Rainy River Improvement Company for the construction of a dam at Kettle Falls, Minnesota,² the question of reference under

¹ See *Papers of the I. J. C.*, p. 56, p. 112, articles by secretaries Burpee and Smith of the Commission; see also *Final Report on the Lake of the Woods Reference* (Washington, 1917), p. 24.

² See *supra*, chap. iii, for the case.

Article IX came up as a matter of observation by one of the American commissioners. Mr. Tawney said: "The interpretation of the treaty by the two Governments is that under Article IX one Government may request that a question be referred, but it is not referred except by the consent of the other Government, so that the two Governments interpret Article IX as meaning that in order to refer a question to the commission it requires the concurrent action of both Governments."³ The Commissioner moreover added that the article is "so construed by the counsel of our State Department at least. They have proceeded upon that interpretation".⁴

This observation of Mr. Tawney's seems to be a correct exposition of the procedure adopted by the two governments for the purpose of referring questions under Article IX to the investigation and report of the Joint Commission. The language of that Article also would appear to corroborate this position, because under that article any question "shall be referred" to the Commission "whenever" either Government "shall request" that such a question be referred. In other words, when one Government makes a request, the other Government is under a duty to acquiesce in that request and bring the matter to the Commission. Consequently the "concurrent action" to which Commissioner Tawney alludes seems possible; in one sense, however, the reference originates through the unilateral action of the requesting Government. Although thus one Government may request the other for an investigation, the Article does not provide that the Commission may conduct an investigation at the request of one Government alone. The result would appear to be that any matter of difference or any questions

³ *Hearings, Rainy River Imp. Co.*, p. 84.

⁴ *Ibid.*, p. 83; see Commissioner Casgrain on p. 84.

along the common frontier may be investigated by the Commission only with the knowledge and acquiescence of both the Governments. If, on the other hand, a unilateral action, pure and simple, of only one Government could invest the Commission with the necessary authority to initiate its examination, there would perhaps be room for dissatisfaction.

If the Canadian Government asked the Joint Commission to investigate the diversion of the waters of Lake Michigan through the Chicago Drainage Canal, on the ground that the diversion affects the Canadian side of the international boundary, could the Commission proceed with the investigation without the fullest acquiescence of the Government of the United States? Or if a similar situation arose on the Canadian side and the United States approached the Commission under Article IX, would the Commission be able to conduct its examinations without the express consent of the Dominion Government? The answers to both these questions seem obviously to be in the negative. Both contracting parties being sovereigns within their respective territories to the exclusion of anybody else, their respective consents would be required for any international agency to exercise its powers of investigation within their territories, unless right to withhold consent is contracted away by agreement.

Again, there is need for both the governments to agree on the terms of reference before the reference is made to the Commission. Both the governments under Article XII of the treaty of 1909 have agreed that "all reasonable and necessary joint expenses of the Commission, incurred by it, shall be paid in equal moities"⁵ by them. The Commission having no funds of its own, would be bound to depend on the two Governments for the expenses it might have to incur in the conduct of its investigations, and it is quite evident that no money will be voted either by the Congress of the United

⁵ Article XII, par. 2.

States or the Parliament of the Dominion of Canada unless the need for its proper expenditure is made clear to the members who respectively compose those two legislative bodies. All investigations being not alike in duration, nature and purpose, the expenditure connected therewith must vary; consequently the legislative control on the national exchequers appears to be a strong factor that has to be reckoned with. Moreover if there were any suspicion in one country that a prospective investigation would be a reflection upon its good name, not only would the government of the country concerned probably endeavor to avoid such an investigation, but it might not even vote its share of the money. If an investigation starts as a result of the mutual agreement or consent of the two governments, these difficulties might be obviated.

Finally one more reason may be adduced here in support of the position that mutual consent of the two governments appears to be necessary for any reference under Article IX to the Joint Commission. During the hearings on the Livingstone Channel Investigation, held by the Commission under Article IX, the Canadian Government appears to have taken the position through counsel that if any expenditure was to be made by either country in improvements in the Livingstone Channel in the Detroit River, the question of the diversion of the waters of Lake Michigan through the Chicago Drainage Canal should first be settled.⁶ The Commission, however, did not express its conclusions or submit a recommendation on this much-debated question when it eventually submitted its report to the two Governments on the matter in question. The possible inference from this investigation and report would seem to be that if either government was entitled to engage the Commission in any matter of investigation without the consent of the other

⁶ *Hearings, Livingstone Channel Case* (Washington, 1913), pp. 178, 186.

government, the Dominion Government seems to have had sufficient cause to have called for an inquiry by the Commission into the Chicago diversion even before the proposed project of the United States in the Livingstone Channel was referred or reported upon. But perhaps because of the various problems involved in the case, the two Governments, while they referred the Livingstone Channel project for investigation, did not make the diversion at Chicago a subject of similar investigation in spite of its alleged vital connection with the boundary waters over which the Commission has both judicial and investigative powers.

Thus looked at from different angles, the conclusion appears to be that mutual consent of the contracting parties to the treaty of 1909 is necessary for the reference of any question under Article IX of that treaty to the International Joint Commission, for purposes of elucidation of facts or law or both, as well as for recommendations which that body might deem advisable and necessary to make under the circumstances. Even if Article IX might mean independent action on the part of either government without the consent of the other, the practice so far set up by both the Governments clearly instills the conviction that they have adopted the most appropriate procedure so far as matters of reference under Article IX are concerned, because all the investigations conducted to date by the Commission have been at the joint request of the two Governments.⁷

⁷ *Papers of the I. J. C.*, p. 89. It may, however, be observed that in the Final Report of the Lake of the Woods reference, the three American Commissioners, made a reservation that "Although we have signed the foregoing report, we do not wholly assent to the restricted system of supervision and control therein recommended, and we reserve the right to submit supplemental conclusions and recommendations in respect thereto and in respect to other matters which in our judgment should be included therein". *Final Report L. W. R.*, *op. cit.*, 73.

REPORTS OF COMMISSION UNDER ARTICLE IX
NOT ARBITRAL AWARDS

When the Commission has completed an investigation, it is its duty to submit not only its report upon the facts and circumstances involved in the question referred, but also the "conclusions and recommendations" appropriate under the circumstances. The Commission should submit these findings and recommendations "in each case so referred".⁸ But whatever be the facts and circumstances which the Commission may establish in its report and conclusions, there is no obligation on either Government, to accept the report and conclusions of the Commission "as decisions of the questions" referred "either on the facts or the law", and they "shall in no way have the character of an arbitral award".⁹

The conclusions and recommendations of the Commission nevertheless, are important. The investigative endeavors of the Commission may furnish data upon which the governments can base their respective diplomatic or arbitral attitudes even though they reject a report submitted by the Commission. It may therefore be observed that the results achieved by the impartial investigations of the Commission may not be entirely futile. If under Article IX the Commission cannot accomplish anything else except render its services merely as a fact-finding body, it should still be looked upon as an organization of considerable importance, for it is likely that the Commission's conclusions and recommendations, although not accepted by either or both governments, may serve to arouse public opinion on both sides of the boundary, and to that extent they would appear to have a political and educational value.

⁸ Article IX.

⁹ *Ibid.*

QUESTIONS REFERRED TO THE JOINT COMMISSION
UNDER ARTICLE IXI. *The Levels of the Lake of the Woods*

For a proper appreciation of the various problems involved in the reference regarding the levels of the Lake of the Woods, a brief survey of the geographical and historical conditions surrounding that lake and its adjoining territories seems desirable. The final report which the Commission submitted to the governments embodies these conditions in an elaborate manner, but for the purpose of this chapter it is hoped that a limited sketch will be adequate.

a. Geographical Conditions

The Lake of the Woods is a part of the boundary waters between the United States and the Dominion of Canada.¹⁰ On the west side of this lake the State of Minnesota and the Provinces of Ontario and Manitoba converge at the Northwest Angle Inlet.¹¹ The lake is situate between two other well-known lakes, Superior and Winnipeg, and in comparison appears rather an insignificant body of water on the map. But "to anyone not thoroughly familiar with the region it is difficult to realize that this beautiful island-studded lake covers an area of nearly 1,500 sq. miles".¹² It appears to be, including Shoal Lake,¹³ an irregular body of water receiving its water supply from a drainage area extending over 26,750 sq. miles, of which approximately 42% lies on the United States side of the boundary and about 58% on the Dominion side. The water surface of

¹⁰ See *supra*, chap. i, the International Boundary; Preliminary Article, Treaty of 1909.

¹¹ *Ibid.*

¹² *Final Report, Lake of the Woods Reference*, p. III.

¹³ See Application of the Greater Winnipeg Water District, Docket no. vii; see *supra*, chap. iii, on Judicial powers.

this drainage system approximates to 3,960 sq. miles, of which 70% is within the Canadian territory and 30% in the United States; that is to say, the Canadian section is confined to the Provinces of Ontario and Manitoba, while the American section lies in the State of Minnesota. The important feature of this watershed is that it is an intricate network of largely rock-bound lakes inter-connected by short and broken streams.¹⁴ Its eastern ridge is within 15 miles of Lake Superior and divides the region that drains into the Hudson Bay from that which drains into the great St. Lawrence system. The southern ridge divides this region from the drainage area of the Mississippi Valley.¹⁵

The major portion of the waters discharged from the Lake of the Woods courses down into Lake Winnipeg through the Winnipeg River and from there via the Nelson River empties into the Hudson Bay. "The International boundary follows the old canoe route of the fur traders from Lake Superior to the Lake of the Woods, and enters the watershed at North Lake. From there it runs through Gunflint Lake, Saganaga Lake, Knife Lake, Basswood Lake, Crooked Lake, La Croix Lake, Sand Point Lake, Namakan Lake, and thence via Kettle Falls¹⁶ to Rainy Lake. . . . From Rainy Lake the boundary runs down Rainy River¹⁷ to the Lake of the Woods."¹⁸ The whole system constitutes "an almost continuous waterway" inter-connected by numerous smaller streams and lakes.

¹⁴ Final Report, pp. 14, 112. For a valuable list of references on the Lake of the Woods see pp. 239-247 of the Final Report.

¹⁵ *Ibid.*, p. 112.

¹⁶ See Application of the Rainy River Improvement Company, Docket no. i.

¹⁷ See Application, Watrous Island Boom Company, Docket no. ii, also of the International Lumber Co., Docket no. xii.

¹⁸ Final Report, *L. W. R.*, p. 112.

There are a number of sites, according to the report of the Joint Commission, on the upper watershed of the Lake of the Woods, in both countries, where waterpower could be developed in case the increasing population on either or both sides of the boundary demand it. The numerous lakes and rivers afford enough opportunity not only for hydro-electric facilities but also for fisheries, navigation and recreation.¹⁹

b. Historical Facts and Circumstances

There are two main outlets to the Lake of the Woods; one at Kenora and the other at Keewatin, both towns in the Province of Ontario, Canada. The Eastern Outlet is the one at Kenora, where the Kenora municipal power plant is situated; the Western Outlet at Keewatin is the larger of the two. Both these outlets seem to have remained in their natural condition until 1779.²⁰ Since that time various efforts have been made to use the waters of the lake for power purposes, although the first attempt to control the levels of the lake was made only about 1887. The reason for this venture seems to be evident. Prior to 1887 the lake had "low stages of water" for some time, and that situation seriously affected the interests of navigation, which was then primarily carried on by Canadians.²¹ In order therefore to stem the danger and better facilitate navigation, the Government of Canada not only authorized in 1887-1888 the building of the Rollerway Dam in the Western Outlet of the Lake, but also appropriated a sum of seven thousand dollars to help the project.²² When the dam was completed, however, it was discovered that the natural level

¹⁹ See *ibid.*, pp. 180-204.

²⁰ Final Report, *L. W. R.*, p. 16.

²¹ *Ibid.*

²² *Ibid.*, p. 17.

of the lake rose, on an average of 1.5 feet during the years 1893-1898.

Meanwhile the Provincial Government of Ontario during 1893-1895 had authorized the Keewatin Power Company, Limited, to construct a dam called the Norman Dam, in the Winnipeg River about a mile below the Rollerway Dam. This construction was undertaken with the hope of developing power, "but the project was never completed"²³ until 1898. During that year the Ontario Government entered into a contract with the Keewatin Power Company, and secured the right to the dam on a payment of four thousand dollars to the company. The right thus secured to the Government was "subject to cancellation by either party upon one month's notice, to thereafter control the dam for the benefit of navigation".²⁴ Since November 19, 1898, however, the Ontario Government has the control of the dam by virtue of the contract.

The Rollerway Dam was removed in 1899, about ten years after its construction; but this act did not in any way reduce the effect upon the natural level of the Lake of the Woods, because the erection and maintenance of the Norman Dam not only had a similar effect but also accentuated the situation by maintaining "the mean lake level about 3.5 feet above what it would have been under natural conditions".²⁵

During 1899-1900 the United States Congress authorized the engineers of the War Department to make surveys of the Warroad River. In 1902, upon the strength of this survey, a project was adopted by Congress for the improvement of the Warroad Harbor. The improvement consisted

²³ *Ibid.*

²⁴ *Ibid.*, also see Lake of the Woods Hearings, Winnipeg, Feb. 1916, pp. 495-496.

²⁵ Final Report, *L. W. R.*, p. 18.

in providing a seven-foot channel as well as plans for reducing all depths "to what the War Department later referred to as the 'normal' level of the lake", that is, "a stage of 7.2 on the Warroad gauge . . .".²⁶ This level, however, seemed to have fallen somewhat in each navigation season during the period of 1901-1904.

Early in 1905 Congress extended the project. At that time the engineers of the War Department seemed to have known of the fact that there was already a dam in one of the outlets of the Lake of the Woods by means of which a certain degree of control of the lake levels would be possible if the United States and Canada could cooperate with each other. In May, 1905, therefore, the United States Government approached the Dominion Government on the matter, suggesting that the latter government operate the Norman Dam in such a way "as to prevent the level of the Lake of the Woods from falling below the datum of 7.2 on the Warroad gauge. . . ."²⁷

In response, the Canadian Government probed into the matter, but decided that the request of the Government of the United States could not be complied with in view of the fact that the maintenance of a 7.2 level would be prejudicial to the interests of important industries at Keewatin and Kenora during times of high water, and that in order to secure a similar level in seasons of low water it would be indispensable to construct a dam in the Eastern Outlet of the lake.²⁸ This conclusion, however, was never officially communicated to the Government of the United States.²⁹ The difficulties were increased when the town of Kenora con-

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 18; see also *Final Public Hearings* (Winnipeg, 1916), p. 517.

²⁸ *Final Report*, p. 19; *Final Public Hearings*, Feb. 1916, pp. 518-524.

²⁹ *Final Report*, p. 19; also see the text of the Report of Consulting Engineers, p. 154.

structed a power plant in the Eastern Outlet in 1906 and "completely closed" that outlet.

Meanwhile other incidents also had occurred which contributed to the complexity of the lake-level question. Ever since the construction of the Rollerway Dam in 1888, settlers on the south shore of the lake in the state of Minnesota seem to have made frequent complaints alleging that their lands had been submerged by the high levels of the lake arising from the construction of that dam.³⁰ In 1895 Colonel Naff, of the General Land Office of the United States Department of the Interior, was sent to inquire into the allegations of the Minnesota settlers. The Colonel later reported that, according to the complainants, the construction of the Rollerway Dam had raised the level of the Lake of the Woods to about three feet higher "than its natural stage", and that "the month of May will be the best season of the year to make a critical examination of the condition and extent of the overflowage and the amount of damage upon which to base a plea of complaint and for relief".³¹

No action seems to have followed this report and the matter was not even brought to the notice of the Canadian Government. Meanwhile the surveyors of the United States Land Office had made a survey of the south shore lands in Minnesota, during the period of 1893-1896, and had "set meander posts marking the border of the lake at the shore line forming the dividing line between open water and willow brush or marsh grass".³² These lands on the American side "have been patented to homesteaders on the basis of the acreage shown on the Land Office maps, even though a portion of the platted area was and ever since has been under water".³³ Moreover, the majority of the settlers

³⁰ Final Report, p. 19.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

on the south shore of the Lake of the Woods had come in 1899 and 1900, that is to say, after the completion of the survey as well as after the construction of the Norman Dam.³⁴

In 1905³⁵ and 1907³⁶ complaints were again lodged by the south shore Minnesota settlers that their lands had been submerged by the high levels of the Lake of the Woods. During the latter year the State Department of the United States received a series of affidavits alleging apparently the same charges and calling for action. Consequently on February 1, 1908, Robert Bacon, then Acting Secretary of State of the United States, addressed a communication to the War Department, referring to the complaints in a general way and seeking information regarding the levels at the Warroad gauge. The War Department indicated that "the fluctuations from 5.10 to 8.90 on the Warroad gauge during the year 1907 were due to natural causes and not to the operation of the dams".³⁷ It may be observed here again that none of the Minnesota protests were brought to the notice of the Canadian Government by the United States authorities.

Between 1908 and 1911 nothing important seems to have materialized except that as an outcome of the various changes and fluctuations in the level of the lake there was a marked low-water stage in 1910 and 1911.³⁸

Here the fact should be remembered that while these difficulties were still unsettled, the Treaty of January 11, 1909, had been concluded between the United States and Great

³⁴ *Ibid.*; see Further Public Hearings, Warroad, Minnesota, Sept., 1915, p. 110.

³⁵ Further Public Hearings, Winnipeg, Feb., 1916, pp. 524-525.

³⁶ Public Hearings, Warroad, Sept., 1912, p. 107.

³⁷ Final Report, p. 21, also see p. 20.

³⁸ *Ibid.*, p. 22.

Britain, and the International Joint Commission had already been provided for by Article VII of that treaty, although it had not then been fully organized.³⁹ In consequence, perhaps, in the report which Major Shunk submitted on June 9, 1911, to the Chief of Engineers of the War Department regarding the levels of the Lake of the Woods, he stated that: "It would be perfectly possible by proper works at the outlet to maintain a good depth of water in the Lake of the Woods at all times. In this particular, however, the interests of navigation and those of power development are directly opposed. . . . It is certainly to be recommended that this matter be brought to the attention of the International Joint Commission."⁴⁰ The Major further reported on June 30, 1911, after his examination of the Norman Dam, that there was a great leakage in the rockfill of this dam and that it "is undoubtedly one cause, and a very considerable one, of the slow recovery of normal level in that lake. . . . It is my opinion that the rubble mound referred to ought to be made water-tight; and as the United States has a considerable interest in the regulation of lake levels, I recommend that the general question of regulation be referred to the International Commission."⁴¹ No immediate steps were taken in accordance with this recommendation, nor towards solving the pending difficulties in some other way.

In addition to all these unsettled questions there was another issue that needed a solution at the hands of the two governments. It centered around a "proposed diversion of the waters of Birch Lake in northern Minnesota from the Lake of the Woods watershed to Lake Superior. . . ."⁴²

³⁹ See *supra*, chap. ii.

⁴⁰ Final Report, p. 22.

⁴¹ *Ibid.*

⁴² *Ibid.*, p. 23.

On December 22, 1910, a report of the Committee of the Canadian Privy Council set forth the various reasons against the proposed Birch Lake diversion. According to this report the city of Winnipeg and other Canadian interests had objections to the diversion; the International Waterways Commission had "reported against the granting of a permit for the diversion without the concurrence of the Canadian Government";⁴³ Article II of the treaty of 1909 was designed to protect the interests on one side of the boundary from adverse effects of diversions on the other side; "special conditions may have to be imposed on the company for the protection of property and other private interests on the Canadian side of the international border, so as to provide the citizens of Canada the same legal remedies as if the injury done them took place in the State of Minnesota";⁴⁴ the Canadian Government desired information regarding "what rights and remedies the citizens of Minnesota will have with regard to the proposed diversion, and what corresponding measures are intended to be taken with a view to the establishment of similar rights, and to provide similar remedies for citizens of Canada";⁴⁵ and finally in relation to possible detriment to navigation the report requested that "the United States Government should be asked whether in cases where the diversion or obstruction of water in one country may be productive of injury to navigation interests in the other, permission for such diversion or obstruction should be granted until the International Joint Commission provided for in the Boundary Waters Treaty has considered and reported upon the effect of such

⁴³ *Ibid.*; see also Report of the International Waterways Commission, Nov. 15, 1906, pp. 118-131.

⁴⁴ Final Report, p. 23; see also article ii of the Treaty of 1909, *infra*, appendix A.

⁴⁵ Final Report, p. 23.

diversions or obstructions upon such interests, with regard to the compensatory works necessary to be constructed in each case.”⁴⁶

On December 29, 1910, the Governor-General of the Dominion forwarded a copy of the above report to the British Embassy in Washington with the request that it be brought to the attention of the United States Government. On August 22, 1911, the Acting Secretary of State replied to the British ambassador that: “The provisions of Article II are regarded by this Government as self-operative as laws and do not require any supplemental legislation to give them effect on this side of the boundary, so that by virtue of this article of the treaty the Canadian interests concerned are already entitled to all the legal rights and remedies which would be extended to them in the local courts if their cause of action arose within the jurisdiction of those courts.”⁴⁷ The Secretary regretted that his Government could not undertake to answer the inquiry regarding the rights and remedies of the citizens of Minnesota in respect to the case under consideration since they depended “to a great extent upon State law rather than Federal law”, and the matter fell therefore “outside of the jurisdiction of this department” except for the purposes of the treaty, the provisions of which were “regarded as sufficient in themselves” to accord Canadian interests similar treatment to that accorded to interests in Minnesota.⁴⁸

On the question of apprehended injury to navigation, the Secretary pointed out that it appeared

from an examination of the terms of the treaty that no jurisdiction is conferred upon the International Joint Commission

⁴⁶ *Ibid.*, pp. 23-24.

⁴⁷ *Ibid.*, p. 24.

⁴⁸ Final Report, p. 24.

with reference to waters flowing across the boundary, or which are tributary to boundary waters, in distinction from boundary waters themselves as defined in the treaty, and that, therefore, the commission has no authority to refuse permission to divert or obstruct waters of the description referred to in this inquiry. That the Canadian Government concurs in this view is evident from the fact that instead of proposing that the desired action be taken under the treaty the proposal comes in the form of a request for the cooperation of this Government. In the absence of an express treaty provision conferring upon the commission jurisdiction to deal authoritatively with a case involving a diversion of tributary waters it does not seem desirable to this Government that such a question should be referred to the commission because the rights of the interested parties in such cases are conclusively established under the provisions of Article II of the treaty and an attempt by the commission to interfere in such rights would necessarily be ineffective. Under Article IX of the treaty, however, jurisdiction is conferred upon the commission to examine and report at the request of either party upon all questions not otherwise dealt with in the treaty which involve the rights, obligations, or interests of either party in relation to the other or to the inhabitants of the other along their common frontier, and it would be agreeable to this Government to take up with the Canadian Government the question of requesting the commission to examine into and report upon a general plan for the improvement for navigation and power purposes of all the boundary waters to which the waters referred to in your note are tributary.⁴⁹

c. Reference to the Joint Commission

On June 27, 1912, "identical letters of reference" ⁵⁰ were addressed to the International Joint Commission by the Governments of the United States and the Dominion of Canada, asking the Commission to inquire into and report

⁴⁹ *Ibid.*, p. 25.

⁵⁰ Final Report, *L. W. R.*, p. 3.

upon the facts and circumstances involved in the three following questions :

(1) In order to secure the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbors of the lake and of the waters flowing into and from the lake, is it practicable and desirable to maintain the surface of the lake during the different seasons of the year at a certain stated level, and if so at what level?

(2) If a certain stated level is recommended in answer to question No. 1, and if such level is higher than the normal or natural level of the lake, to what extent, if at all, would the lake, when maintained at such level, overflow the lowlands upon its southern border, or elsewhere on its border, and what is the value of the lands which would be submerged?

(3) In what way or manner, including the construction and operation of dams or other works at the outlets and inlets of the lake, or in the waters which are directly or indirectly tributary to the lake, or otherwise, is it possible and advisable to regulate the volume, use, and outflow of the waters of the lake so as to maintain the level recommended in answer to question 1, and by what means or arrangement can the proper construction and operation of regulating works, or a system or method of regulation, be best secured and maintained in order to insure the adequate protection and development of all the interests involved on both sides of the boundary, with the least possible damage to all rights and interests, both public and private, which may be affected by maintaining the proposed level? ⁵¹

In September, 1912, the Commission began its inquiry into the above questions. On the seventeenth of that month hearings were held at International Falls, Minnesota, on the

⁵¹ *Ibid.*, p. 25.

eighteenth at Warroad, Minnesota, and on the twentieth at Kenora, Ontario.⁵² Its consulting engineers⁵³ submitted a progress report early in 1913, "noting the number and extent of surveys made and the fixing of the first bench marks ever established on this lake".⁵⁴ Subsequent to this report a special committee of the Joint Commission visited the Lake of the Woods, investigated and reported back to the Commission which later submitted a progress report. Further hearings had to be held at Warroad on September 7, 8 and 9, 1915, at International Falls on September 19, and at Kenora between the 13th and 14th. After these hearings the Commission appointed a sub-committee of engineers to examine and report on the condition of flood at Warroad and certain other localities. Again in 1916 hearings were held at International Falls between January 28-29, at Winnipeg, Manitoba, during February 1-4, and at Washington on April 4-8.⁵⁵

Subsequently the Commission studied the questions of reference in the light of all this testimony, engineering and otherwise, and on May 18, 1917, after about five years of constant and constructive hard work, submitted its report and recommendations to the two Governments.

d. The Commission's Report and Recommendation
on question 1 of the reference

The Commission reported that "the maintenance of an absolutely uniform level of the Lake of the Woods, over long periods of time"⁵⁶ was not practicable because of the fact

⁵² *Papers of the I. J. C.*, p. 118.

⁵³ Report of the International Joint Commission relating to the official reference of the Lake of the Woods, by Arthur V. White and Adolph F. Meyer, consulting engineers; three volumes and atlas, 1915.

⁵⁴ *Papers of the I. J. C.*, p. 118.

⁵⁵ *Ibid.*

⁵⁶ Final Report, *L. W. R.*, p. 26.

that yearly precipitation varied greatly on the watershed of the lake; nor was such an attempt to secure a stated level desirable since "it would not admit of the most advantageous use of the waters flowing into and from that lake". Nevertheless the Commission had reached the conclusion after "a careful study of the physical data submitted in the report of the consulting engineers, and a consideration of all the interests involved",⁵⁷ that it was both practicable and desirable to obtain in the lake "a relatively uniform level throughout all ordinary seasons, but that in order to secure the most advantageous use of the waters flowing from the lake it is necessary to permit a draft on the water stored in the lake, in excess of 2 or 3 feet, during periods of exceptional drought occurring about once in 20 years, for the purpose of maintaining a satisfactory outflow; and also to permit the storage of some of the flood water above the ordinary maximum level during occasional years of excessive flood inflow".⁵⁸

With the above object in view and with due consideration of the requirements of the various interests involved in the question, the Commission submitted that "subject to proper compensation and protection being provided, for property and interests injuriously affected, the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from that lake, and of the shores and harbors of the lake, can be secured by maintaining the level of the lake at an ordinary maximum stage of 1,061.25, sea level datum".⁵⁹ If however the level rises to 1,601.0, the water may be "wasted or conserved" according to the directions that may be had from an international board of supervision and control which the Commission later recommended. But between 1,056 and 1,061 the proper Canadian authorities

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, pp. 26-27; on sea level datum see *ibid.*, p. 9.

might draw the water on condition that "the level of the lake shall not, even toward the end of a series of dry years, be drawn below 1,056 sea level datum, without an approval of this commission, and then only upon such terms and conditions as it may impose".⁶⁰

Finally the Commission pointed out that the additional storage, which it had provided for the Upper Rainy waters, would be helpful in slightly increasing the ordinary maximum level without inflicting "injury to any interests on the lake and with material benefit to the waterpower interests both at and below the outlets".⁶¹

e. Conclusion and Recommendation on Question 2.

The Commission in answering the second question pointed out that the ordinary maximum level of 1,601.25 sea level datum which it had recommended was 2.23 feet higher than the natural or computed normal level of the lake. In giving consideration to the low lands flooded on the southern border of the Lake of the Woods and elsewhere on its margin, as well as to such other "lands injuriously affected by the recommended ordinary maximum level through occasional flooding, wind effects and seepage",⁶² the Commission concluded that "flowage should be obtained up to contour 1,064, sea level datum".⁶³ In other words, all lands lying below the 1,064 contour were regarded as being liable either to submerging or injurious effects under the level recommended by the Commission.⁶⁴ On this assumption the Commission evaluated the areas for which flowage rights were to be secured both in the United States and Canada; the former had

⁶⁰ *Ibid.*, p. 27.

⁶¹ *Ibid.*

⁶² *Ibid.*, p. 39, also p. 28.

⁶³ *Ibid.*

⁶⁴ See *ibid.*, p. 30.

on December 31, 1915, a total of 23,968 acres valued at approximately \$164,000, and the latter 40,792 acres with a value of \$81,000, altogether \$245,000. The Commission also estimated a cost of \$115,000 for protection, of which a sum of \$5,000 was allotted for the Canadian side of the boundary at and near Rainy River, while the remaining \$110,000 was assigned for lands and protective works in Minnesota.⁶⁵

f. Conclusion and Recommendation on question 3.

Under the third and last question the Commission reported that it was highly useful and desirable to have a system of regulated volume, flow and use of the waters of the Lake of the Woods, as well as to "insure the adequate protection and developments of all the interests involved on both sides of the boundary".⁶⁶ Toward this end the Commission suggested certain conditions:

(1) The outflow capacity of the lake should be increased to 47,000 cubic feet second "at a stage 1,061 sea level datum, costing about \$175,000; and by compensating interests at the outlets and on the Winnipeg River, involving about \$25,000 and \$30,000, respectively". The dam in the Winnipeg River⁶⁷ should be used for regulating purposes. If however it is used not only for regulating purposes but also for power, "then the necessary additional waste-way capacity will cost about \$60,000".⁶⁸

(2) Advantage should be taken of the "existing reservoir capacity of something over 100 billion cubic feet on Rainy River and the lakes immediately above Kettle Falls".⁶⁹

⁶⁵ *Ibid.*, pp. 30-31, 39-40.

⁶⁶ *Ibid.*, p. 40.

⁶⁷ The Norman Dam.

⁶⁸ Final Report, *L. W. R.*, p. 40.

⁶⁹ *Ibid.*

(3) As soon as demands for hydroelectric power would justify, these reservoirs should be enlarged "so as to be able to store an additional 45 billion cubic feet—the cost of which is difficult to estimate at the present time."

(4) An international control should be established over all dams and regulating works "extending across the international boundary, also the dam at Kettle Falls in the Canadian channel, and, when the level rises above 1,061 or falls below 1,056, sea level datum, the dams and regulative works at the outlets of the Lake of the Woods".⁷⁰

The Governments accepted the report, although it was only in 1925 that a treaty was concluded between them for the purpose of installing an International Board to regulate the levels.⁷¹ This board consists of two engineers representing the two Governments, and is required "to assume jurisdiction over the discharge from the lake (which occurs in Canadian territory) when the level falls below the minimum of 1,056 sea level datum provided in the treaty".⁷² It is also the duty of this board to report upon the "suitability and sufficiency" of protective works which the treaty seems to require the United States to construct. If on this question of suitability and adequacy of the remedial works a difference of opinion arises among the members of the board, the matter should be referred to the Commission. In fact, any disagreement among the board members "as to the exercise of their functions" should be referred to the Commission rather than to the Governments.⁷³ The Commission moreover has

⁷⁰ *Ibid.*; see also Treaty and Protocol between Canada and the United States to Regulate the Level of the Lake of the Woods, Feb. 24, 1925, U. S. Treaty Series, no. 721; see *infra*, appendix D.

⁷¹ *Ibid.*

⁷² *Ibid.*, article iii; also see *Papers of the I. J. C.*, p. 84.

⁷³ See *supra*, Judicial Powers, chap. iii, B., Boards of Control; see also article iv of the Treaty and Protocol, *supra*.

a discretionary power, under Article V of the treaty, to raise the level of the Lake beyond the maximum elevation of 1,061 sea level datum fixed by the treaty, provided the board makes a recommendation to that effect.⁷⁴

II. *The Pollution of Boundary Waters.*

About three weeks after the reference of the Lake of the Woods question the two governments submitted another very vital question for the inquiry, report and recommendation of the Joint Commission. That problem fundamentally concerned the public health of thousands of people on and around the boundary waters. On August 1, 1912, the two governments asked the Commission the two following questions:

(1) To what extent and by what causes and in what localities have the boundary waters between the United States and Canada been polluted so as to be injurious to the public health and unfit for domestic or other uses?

(2) In what way or manner, whether by the construction and operation of suitable drainage canals or plants at convenient points or otherwise, is it possible and advisable to remedy or prevent the pollution of these waters, and by what means or arrangement can the proper construction or operation of remedial or preventive works, or a system or method of rendering these waters sanitary and suitable for domestic and other uses be best secured and maintained in order to insure the adequate protection and development of all interests involved on both sides of the boundary, and to fulfill the obligations undertaken in Article IV of the waterways treaty of January 11, 1909, between the United States and Great Britain, in which it is agreed that the waters therein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other?⁷⁵

The Commission met two months after this reference at

⁷⁴ See *Papers of the I. J. C.*, p. 85.

⁷⁵ Final Report, Pollution of Boundary Waters, p. 5.

Ottawa in October, 1912. Here a doubt arose whether the two governments "intended that pollution in all boundary waters was to be included in the investigation".⁷⁶ To clear up the ambiguity the Commission wrote to both the governments and asked "whether or not the broad scope of the inquiry is to be circumscribed by construction . . . to cases of pollution of the boundary waters on one side . . . which extend to and affect the boundary waters upon the other side".⁷⁷ The American Secretary of State⁷⁸ replied on November 19, 1912, to the effect that both the governments of the United States and Great Britain had "reached an accord that the inquiry is to be confined to cases of pollution of boundary waters on one side of the boundary which extend to and affect the boundary waters upon the other side".⁷⁹ The Commission meanwhile had decided to omit from its investigation the waters of rivers flowing across the boundary, in so far as the governments had not called for such an investigation, although it may be noted here that under the second paragraph of Article IV of the treaty of 1909, the contracting parties "have agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other".⁸⁰ Apart from the fact the governments had not called for an investigation of cross-boundary waters, the Commission seems to have thought that it was "clear that the treatment prescribed in the case of rivers which are boundary waters should be made applicable to"⁸¹ cross-boundary waters as well.

⁷⁶ *Ibid.*, p. 6.

⁷⁷ *Ibid.*

⁷⁸ Mr. P. C. Knox.

⁷⁹ Final Report, *P. B. W.*, p. 6.

⁸⁰ Article iv, par. 2; see *infra*, appendix A.

⁸¹ Final Report, *P. B. W.*, p. 6.

Under these restrictions the first question of the reference implied three factors to be established: the localities and extent of pollution of boundary waters, the sources of such pollution, and finally the regions where such pollution has a transboundary effect.⁸² The last factor necessarily involved the determination of what may be construed as an "injury to health or property" within the purview of the treaty of 1909.⁸³ With these three objectives in view, the Commission planned out a procedure in order to organize itself for a thorough, extensive and expeditious investigation of all matters many of which required the assistance of experts. Consequently the Commission enlisted the "sympathetic aid and cooperation of sanitary experts, health officials, and others"⁸⁴ on both sides of the boundary. On December 17 1912, upon invitation from the Commission, representatives of the two governments, and their various medical and sanitary experts, met with the Commission at Buffalo, New York.⁸⁵ At this conference Mr. A. H. Seymour, then secretary of the New York Department of Health was appointed chairman and Dr. Allen J. McLaughlin of the United States Public Health Service secretary.

After the organization, the Commission requested the conference to advise it regarding the localities where investigations should be made. The Conference suggested that the points of examination should include

Rainy River, St. Mary's River, Lake St. Clair, Detroit River, Niagara River, the St. Lawrence River from Lake Ontario to a point as far below the international boundary line as should be thought necessary, the lake waters in the vicinity of Port Arthur, Fort William, and Duluth, the lower end of Lake

⁸² *Ibid.*, p. 8.

⁸³ See *supra*, article iv.

⁸⁴ Final Report, *P. B. W.*, p. 9.

⁸⁵ See *ibid.*, pp. 9-10 for the names of those present on the occasion.

Huron in the vicinity of Sarnia and Port Huron, the western end of Lake Erie in the vicinity of Cleveland and Port Stanley, the eastern and western ends of Lake Ontario, and sections of the latter lake at Rochester and Toronto. It was contemplated that other points on the boundary outside of the Great Lakes system should be examined if subsequently deemed desirable.⁸⁶

The conference also suggested that the investigation should include "a bacteriological examination of samples taken, including a bacterial count, the qualitative and quantitative estimation of *B. coli* according to standard methods and such chemical examination as might subsequently be deemed necessary".⁸⁷ In February 1913, a detailed scheme was prepared for conducting these investigations, and Dr. McLaughlin was appointed the chief sanitary expert and director of field work. Three Canadian specialists, Doctors J. W. S. McCullough of Ontario, John A. Amyot of Toronto, and Mr. F. A. Dallyn, C. E., provincial sanitary engineer, Toronto, collaborated with Dr. McLaughlin. These four men were therefore called "the sanitary experts".

The carrying out of these detailed investigations might probably be regarded

the most extensive bacteriological examination of waters the world has ever known. It embraced Rainy River, parts of Rainy Lake, parts of Lake of the Woods, Thunder Bay in Lake Superior, St. Mary's River, Mud Lake, Detour Passage, lower Lake Huron, St. Clair River, Lake St. Clair, Detroit River, the western end of Lake Erie, the central portion of Lake Erie, the eastern end of Lake Erie, Niagara River, the western and eastern portions of Lake Ontario, the St. Lawrence River from Lake Ontario to Cornwall, and the St. John River so far as it forms the international boundary.⁸⁸

⁸⁶ *Ibid.*, p. 10.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

Over 1,500 localities were chosen for purposes of taking samples of waters, and over 18,000 samples were collected at them.⁸⁹

Besides such a stupendous bacteriological examination "some float and temperature observations were made and . . . data collected and compiled as to area, population, location of water supply intakes, quantity of sewage discharged for each of the several municipalities in the areas under investigation".⁹⁰ Furthermore, not merely satisfied with the exhaustive sanitary evidence of experts, the Joint Commission held its sessions in various places along the boundary and gathered information from a great number of people who had sufficient knowledge of the unsanitary conditions and pollutions of different regions. The Commission, moreover, addressed a series of questions to six "sanitary engineers of large experience and wide reputation in the United States and Canada".⁹¹ These experts, called the "advisory engineers", met in New York City on May 26 and 27, 1914, and were examined by the Commission on sanitary questions as applied to the boundary waters.⁹² Their views the Commission later admitted in its report had "not only been of great assistance to the Commission" in formulating its conclusions and recommendations but also "their thoroughness and exhaustiveness have been recognized by scientists on this continent and in Europe".⁹³

In addition to all this elaborate investigation and examination, the Commission felt the necessity of setting up another branch of inquiry in order to discover the cost of installing

⁸⁹ For location of laboratories, see table in Final Report, *P. B. W.*, p. 11.

⁹⁰ *Ibid.*, p. 12; also in general see *Report of the Consulting Sanitary Engineer upon Remedial Measures* (Washington, 1918), pp. 1-12.

⁹¹ For their list see Final Report, *P. B. W.*, p. 13.

⁹² See *ibid.*, pp. 13-15.

⁹³ *Ibid.*, p. 15.

the requisite remedial works that might be deemed necessary in the future. For this purpose Professor Earle B. Phelps of the United States Public Health Service was appointed as the Commission's consulting engineer and was placed in charge of the proper investigation with engineering offices at Detroit and Buffalo, each office having a well-organized personnel under the supervision of Professor Phelps. The Detroit office was responsible for the investigations along the St. Clair and Detroit Rivers, while the Buffalo office supervised the Niagara River. These investigations covered 18 localities in the United States and 12 in Canada.⁹⁴

Whatever other helps the Joint Commission needed to fulfill the arduous task entrusted to it by the United States and Canada, it procured through the unstinted cooperation of authorities of towns, cities, states and provinces⁹⁵ alike; and on August 12, 1918, after a period of over six years, the Commission submitted its report and recommendations.

Findings and Recommendations of the Commission.

(1) "The Great Lakes beyond their shore waters and their polluted areas at the mouths of rivers which flow into them are, except so far as they are affected by vessel pollution, in a state of almost absolute purity."⁹⁶ With the exception of these sections the whole stretch of the boundary waters comprising the "Rainy River, St. Mary's River, St. Clair River, Detroit River, Niagara River, St. Lawrence River from Lake Ontario to Cornwall, and the St. John River from Grand Falls to Edmundston, New Brunswick, is polluted to an extent which renders the water in its unpurified state unfit for drinking purposes."⁹⁷ The source of this

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, p. 16.

⁹⁶ *Ibid.*, p. 51.

⁹⁷ *Ibid.*

pollution, in the opinion of the Commission, is in the sewage and inflows during storms, from the riparian cities and towns as well as the sewage from the vessels that navigate these waters. In most places the shore waters, because of sewage discharges, are "unsightly, malodorous and absolutely unfit for domestic purposes". These waters further "are a source of serious danger to summer residents, bathers, and others who frequent the localities. So foul are they in many places that municipal ordinances have been passed prohibiting bathing in them."⁹⁸

(2) The Commission found that the perilous pollution existing in the Detroit and Niagara Rivers endangering the health and welfare of inhabitants in both the United States and Canada was a "direct contravention of the treaty". This reference seems to be to the second paragraph of Article IV of the treaty of 1909, referred to elsewhere. What was true of the Detroit and Niagara Rivers was, "though in a less marked degree", true of the Rainy and St. John Rivers also.

(3) The Commission felt equally strongly that the pollution of the St. Mary's, St. Clair and St. Lawrence Rivers was "in substantial contravention of the spirit of the treaty", and unless these deplorable conditions were remedied and "the rivers placed under the control of competent authority, the resulting injury will be much more pronounced as pollution increases".

(4) In certain sections of the boundary waters the pollution is due to vessel pollution", and it causes "substantial injury to health and property". It finds its origin in "sewage waste from vessels" and "water ballast", which lake vessels take in at their ports and later empty into the waters of the lakes. "Vessel pollution is distinctly traceable in boundary waters in lanes and channels which vessels traverse

⁹⁸ *Ibid.*, pp. 51-52.

in navigating them, their waters being thereby rendered unfit for drinking purposes ”.

(5) In some instances mill wastes, garbage, offal, carcass and other waste matters and dirt are discharged into the waters, creating thereby a condition which results “ generally in a contravention of the treaty ”.

(6) In the opinion of the Commission it is “ feasible and practicable ” without unduly burdening the communities responsible for offences to prevent the pollution or remedy it “ both in the case of boundary waters and waters crossing the boundary ”:

a. City sewage should be treated by the “ installation of suitable collecting and treatment works ”. This process would remove “ bacteria and matters in suspension ”.

b. Vessel sewage should be disinfected prior to discharge into the waters. In regard to water ballast “ suitable rules and regulations ” should be prescribed with a view to protect the water intakes.

c. Discharge of garbage, wastes from sawmills and other refuse “ should be prohibited ”, and regulations should be prescribed regarding the disposal of industrial wastes.

(7) “ In order to remedy and prevent the pollution of boundary waters and to render them sanitary and suitable for domestic purposes and other uses, and to secure adequate protection and development of all interests involved on both sides of the boundary, and to fulfill the obligations undertaken in Article IV of the treaty, it is advisable to confer upon the International Joint Commission ample jurisdiction to regulate and prohibit this pollution of boundary waters and waters crossing the boundary.”⁹⁹

Thus the Commission finished a very extensive and important task on behalf of the health of the communities, both American and Canadian, that inhabit the shores and banks of the boundary and cross-boundary waters.

⁹⁹ Final Report, *P. B. W.*, p. 52.

After the submission of the reports and recommendations, the two governments requested the Commission, on March 11, 1919, to draft if necessary "reciprocal legislation to be enacted by the respective Governments or a form of treaty to be negotiated" in order to accomplish the purpose of the various recommendations the Commission had made.¹⁰⁰ The Commission chose to draw up a treaty, and for that purpose held its own sessions as well as conferences with the representatives of both governments, in New York City, Washington and Ottawa. The draft treaty was submitted to the two governments on October 6, 1920.¹⁰¹ But no action seems to have been taken on it since then.

III. *The Livingstone Channel Investigation*¹⁰²

"As for the Livingstone Channel", said United States Congressman Cannon of Illinois on the occasion of appropriation debates in 1913 in connection with the Joint Commission, "a man said in conversation with me—I will not give his name—'where the devil is the Livingstone channel? Is that some water that was named after Livingston, the great African explorer?'"¹⁰³ This impassioned inquiry seems clearly to indicate the need for a brief geographical sketch of the Livingston Channel. It is a channel in the Detroit River, about eleven miles long, constructed by the government of the United States at a cost of about eleven million dollars. This channel "departs from the main channel of the stream a short distance above the Limekiln ridge of rock and extends in a direct course some 5 miles down the Detroit River to near Bar Point, when it becomes part of the main

¹⁰⁰ *Papers of the I. J. C.*, pp. 118-121.

¹⁰¹ *Ibid.*, p. 121.

¹⁰² Hereinafter referred to as *R. L. C. I.* (Report Livingstone Channel Investigation, Washington, 1913).

¹⁰³ Congressional Record, vol. 49, 1913, p. 3121, 62nd Cong., 3rd Sess.

channel and continues on the same course down into Lake Erie".¹⁰⁴

In this channel the Government of the United States planned to construct certain compensatory works for the benefit of navigation, but before undertaking the project, the Government wanted the matter inquired into and reported upon by the Joint Commission under Article IX. Consequently on October 16, 1912, two questions were jointly referred to the Commission by the Governments of the United States and Canada. They were:

1. Under all the circumstances and conditions surrounding the navigation and other uses of the Livingstone and other channels in the Detroit River on either side of the international boundary, is the erection of any dike or other compensatory work deemed necessary or desirable for the improvement or safety of navigation at or in the vicinity of Bois Blanc Island in connection with the rock excavation and dredging in Livingstone Channel authorized by the rivers and harbors act of June 25, 1910, . . . and now being carried out by the Government of the United States?

2. If in answer to question 1 any dike or other compensatory works are found to be necessary or desirable, will the work or works proposed by the United States and provided for in the rivers and harbors act of June 25, 1910 . . . and located so as to connect the north end of Bois Blanc Island to the southeast end of the existing cofferdam on the east side of Livingstone Channel, opposite and below Stoney Island, be sufficient for the purpose; and if not, what additional or other dikes or compensatory works should be constructed and where should they be located in order to serve most advantageously the interests involved on both sides of the international boundary?¹⁰⁵

¹⁰⁴ *R. L. C. I.*, p. 8.

¹⁰⁵ Report, *L. C. I.*, p. 4; also see The River and Harbor Act, June 25, 1910, 36 Stat. 655; House Doc. 676, 61st Cong., 2nd Sess., also 36 Stat. 729, and 36 Stat. 1405 (Sundry and Civil Appropriations Act, March 4, 1911).

After this reference had been made to the Joint Commission, the Dominion Government undertook an examination of the various channels of the boundary waters system. This work had not been completed at the time when the Joint Commission started its investigations. The Attorney General of the Dominion, therefore, through his solicitor, wrote to the Commission on May 13, 1912, requesting the Commission "to refrain from reporting until such examination is finished".¹⁰⁶ The Commission, however, held its hearings, but the Dominion Government opposed the project on various grounds, some of which were:

1. The Canadian Government was investigating the plans for a proposed submerged weir in the Niagara River, and until reports were received from that investigation as well as from other investigations, "it would appear undesirable at the present time for either Government to commit itself to a policy of compensatory works at individual points in the interested waters until some definite conclusion is reached as to the extent to which diversions from Lake Michigan are to take place".¹⁰⁷

2. The diversion from Lake Michigan at Chicago, through the drainage canal, being, according to the Canadian Counsel's understanding, 3000 or more, cubic feet per second in excess of the amount permitted by the United States Secretary of War, "the proposed compensatory works will just about restore to the stream at the head of Livingstone Channel and will not restore to Lake St. Clair what was lost by deepening and an excess diversion of even 3000 c. f. s.". ¹⁰⁸

3. Canada has spent "not less than the sum of \$197,464,159" in building and improving the canal system in

¹⁰⁶ *Hearings*, p. 12.

¹⁰⁷ See Memorandum submitted by Mr. White, K. C., for the Canadian Government, *Hearings*, L. C. I., p. 13.

¹⁰⁸ *Ibid.*, p. 14.

river, lake and harbor improvements; "large expenditure for like purposes are now in contemplation".¹⁰⁹

4. Canada moreover has "sincere desire for the development of the entire system of waterways in the best interests of the people of the two countries".¹¹⁰

5. The Canadian Government "wishes to cooperate to the best extent possible with the Government of the United States" as far as the project in question was concerned.

6. The interests and rights of the Province of Ontario "are of paramount importance" in the matter in so far as Ontario borders "the Great Lakes and the Lake of the Woods systems".

7. The city of Amherstburg opposed the project.¹¹¹

On these grounds the desirability of the proposed improvement was seriously open to question.¹¹²

Apart from the above reasons submitted by Mr. White, K. C., in a memorandum on behalf of the Dominion Government, he further argued that the construction of the dike proposed by the United States Government was unnecessary because the alleged cross-currents in the channel were of no real danger in view of the fact that out of the 1,227 vessels that passed through the channel in 1913, not even one single case of grounding or any other mishap was reported. This fact "proves that immediate improvements are not necessary".¹¹³ Mr. Francis King on behalf of the Dominion Marine Association also wanted the project to be kept in abeyance because the carrying draft of the Association was rather limited by "the draft available at the Sault River";

¹⁰⁹ *Ibid.*, p. 13.

¹¹⁰ *Ibid.*, p. 14.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, pp. 13-14.

¹¹³ *Ibid.*, p. 178.

he submitted further that the "compensatory works at the present stage would so alter the condition that possibly our argument in connection with the Chicago Drainage Canal would be considerably weakened. Data would be destroyed, a new basis for argument should be found." ¹¹⁴

Mr. Charles S. MacInnes, K. C., also appearing on behalf of the Dominion Government, apparently followed the line of argument adopted by his colleague Mr. White. On the question of diversion through the Chicago Drainage Canal, Mr. MacInnes maintained that "a cessation of that diversion in Lake Michigan would have a greater effect upon compensation than this dam".¹¹⁵ Here Commissioner Turner (U. S.) broached an interesting question. He wanted to know how the Commission could attach a rider to its order with a view to regulate the action of the Congress of the United States in relation to the Chicago diversion from Lake Michigan which "is not within the jurisdiction of this Commission under the treaty" and on which diversion the two governments had not called for an inquiry.¹¹⁶ Thereupon Commissioner Casgrain (Canada) remarked that, "There is an authority to the effect that Lake Michigan is a boundary water".¹¹⁷ The Commissioner however did not cite the authority he referred to. Meanwhile Commissioner Powell, also of Canada, stated that, "There may not be a comprehensive jurisdiction, but there is a specific jurisdiction because Article I of the treaty (1909), says that so long as this treaty shall remain in force this same right of navigation shall extend to the waters of Lake Michigan and to all canals and connecting waterways etc." ¹¹⁸ No further discussion followed

¹¹⁴ *Ibid.*, pp. 173-174.

¹¹⁵ *Ibid.*, p. 182.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, p. 183.

¹¹⁸ *Ibid.*

on Lake Michigan, although Counsel MacInnes seems to have urged that the "Chicago matter" should first be settled before the proposed dike was authorized.¹¹⁹

The Province of Ontario submitted through Counsel Staunton that the proposed work was "illegal" because if permitted, "you will throw a larger quantity of polluted water on the shores of the Province of Ontario". He placed reliance on Article IV of the treaty of 1909, and referred to other evidence submitted to the Commission;¹²⁰ secondly, the counsel said that the construction of the dike and other remedial works would affect the Amherstburg channel injuriously. In this plea Counsel Hough for Amherstburg, Ontario, strongly concurred, later submitting that the dike "would eject a volume of water around the head of Bois Blanc Island right across Amherstburg Channel, and . . . would render that channel dangerous . . . to navigate".¹²¹ On the question of pollution Mr. Powell suggested to Counsel Staunton that "you have a much stronger case under Article VIII of the treaty . . . the high contracting parties . . . have subordinated the navigation rights to the sanitary rights, so if you make a sanitary case it would be an absolute estoppel".¹²² The counsel, however, does not seem to have followed this suggestion.

The case for the United States was presented by Mr. Strickland, Assistant to the Attorney General of the United States. He examined Colonel Mason Patrick on behalf of the United States to establish that the channel in the Detroit River was congested by traffic, that that channel was on the Canadian side along the shore in the vicinity of Amherst-

¹¹⁹ *Ibid.*, p. 186.

¹²⁰ *Ibid.*, p. 187.

¹²¹ *Ibid.*, p. 193.

¹²² *Ibid.*, p. 190.

burg, and that "in order to provide for a safer navigation in this congested part of the river the United States made provision for a separate channel, beginning at Stony Island and leading to the westward of Bois Blanc Island to Lake Erie".¹²³ This provision was for the Livingstone Channel which was provided for in 1906 and opened in 1912.¹²⁴ Colonel Patrick further submitted in reply to Mr. Strickland's question that in his opinion "the dam as now proposed will be sufficient to practically eliminate these cross-currents from the eastward".¹²⁵

The Commission's Conclusions.

After a careful study of the case from the various points of view the Commission concluded that "under all the circumstances surrounding the navigation and other uses of the Livingstone and other channels—in the Detroit River, 'we do not deem the erection of any dike or other compensatory work necessary or desirable for the improvement or safety of navigation considered from the standpoint of compensation alone'.¹²⁶ Construction of a dike was "very desirable" to check or materially lessen the effect of cross-currents in the Livingstone Channel, but such a dike could possibly be constructed at some other point "at practically the same cost" without injury to Canadian interests. In view of this conclusion, the Commission further reported that compensation under the circumstances being unnecessary, it "does not consider it is called upon to discuss or express an opinion as to the extent diverted water at Chicago might affect the flow in the Detroit River, nor is it necessary to consider its authority, under the terms of the reference, to

¹²³ *Hearings, L. C. I.*, p. 17.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, p. 22.

¹²⁶ *Report, L. C. I.*, p. 16.

report upon the same".¹²⁷ In reply to the contentions of the province of Ontario, the Commission pointed out that in view of the fact that the construction of a dike which the Commission later recommended "will not increase either the flow or current of the river at Amherstburg", it was not necessary to review the arguments of counsel for the province. Consequently the question of pollution of the waters in "violation of the provisions of the treaty between the United States and Great Britain of May 5, 1910"¹²⁸ did not in the opinion of the Commission call for a consideration.

Recommendations.

The Commission therefore recommended to the governments that the building of a dike "to the west of and parallel with the Livingstone Channel, and extending down-stream about 4,400 feet from the point below the channel used by boats crossing between Sugar island and Amherstburg in the Detroit River, said point being about 2,800 feet below the lower end of the coffer dam."¹²⁹ In that case about 1,200 feet of the upper end of the dike would be on the United States side of the boundary and the remainder on the Dominion side.

It may be noted here that the Commission made a further recommendation on a matter which, "although technically not within the terms of the reference",¹³⁰ as the Commission admitted, was nevertheless developed during the testimony of Colonel Patrick of the United States and Mr. Stewart, the Canadian Chief Hydrographer. That Recommendation was that the "wedge-shaped strip adjoining the channel entering the Livingstone channel on its west side" should be

¹²⁷ *Ibid.*

¹²⁸ Ratifications of the Treaty of 1909 were exchanged on this date.

¹²⁹ Recommendations, Report of L. C. I., p. 17.

¹³⁰ See Recommendations, *ibid.*, par. 3.

excavated.¹³¹ The importance of this action seems to be that in cases where the Commission "feels justified in recommending", as it said in this instance, it may, *even when not called for*, make justifiable recommendations to the two governments.

From the nature of the questions involved in the Livingstone Channel investigation it would appear that that question could possibly have been referred to the Commission under the judicial Articles III and VIII of the treaty of 1909 for a decision instead of a report or recommendation under the investigative Article IX. In the St. Clair River Channel case which the Commission decided under Articles III and VIII, a similar situation to the one involved in the Livingstone Channel questions seems to have been present. Nevertheless it may be noted that the St. Clair Channel case was presented to the Commission for decision only in 1916, that is, about four years after the investigation in the case of the Livingstone Channel. If Canada had withheld her consent for a reference of the Livingstone issue, then it seems the United States could have, without Canadian consent, brought an application to the Commission under Articles III and VIII and called for a decision, because under these Articles no joint application or request is necessary for either party to seek the Commission's approval when either of them undertakes any governmental works in the boundary waters.¹³²

IV. *The St. Lawrence River Navigation and Power Investigation*¹³³

Before proceeding to discuss this investigation it appears necessary to say that the subject is approached, as far as

¹³¹ *Ibid.*

¹³² See Article iii, section 2; see *infra*, appendix A.

¹³³ Abbreviated hereafter as *St. L. R. I.* (St. Lawrence River Investigation).

possible, from the standpoint of the work of the Joint Commission only. This method alone seems feasible in the light of the facts that the scope and aim of this work is essentially confined to a study of the Commission, and that the nature of the subject, beyond the Commission's activities, still appears to be highly controversial and indefinite.

The cardinal motive for this extensive and exhaustive investigation was a keen desire of the people of the western section of the North American continent, bordering or dependent on the Great Lakes-St. Lawrence waterway system, to open an outlet for their agricultural, industrial and other commercial products. This desire found official recognition in 1919, when the Congress of the United States passed an "Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, also for other purposes".¹³⁴ Section 9 of this Act reads:

That the International Joint Commission created by the treaty between the United States and Great Britain, relating to boundary waters between the United States and Canada, signed at Washington, January 11, 1909, under the provisions of Article IX of said treaty, is requested to investigate what further improvement of the St. Lawrence River between Montreal and Lake Ontario is necessary to make the same navigable for ocean-going vessels, together with the estimated cost thereof, and report to the Government of the Dominion of Canada and to the Congress of the United States, with its recommendations for cooperation by the United States with the Dominion of Canada in the improvement of said river.

On the 21st of January, 1920, the Governments of the United States and Canada jointly referred to the International Joint Commission the following questions for investigation and report.

¹³⁴ Public, No. 323, 65th Cong., 2nd Sess., Act of March 2, 1919; 40 Stat. 1275, section 9; also see *Papers of the I. J. C.*, p. 138.

Text of Reference

I have the honor to inform you that the Governments of the United States of America and of the Dominion of Canada, under the provisions of Article IX of the treaty of the 11th of January, 1909, between the Governments of the United States and Great Britain, herewith refer certain questions, as set forth below, involving the beneficial use of the waters of the St. Lawrence River between Montreal and Lake Ontario, in the interests of both countries, and, in general, the rights, obligations, or interests of either in relation to the other, or to the inhabitants of the other along their common frontier.

It is desired that the said questions be made the basis of an investigation to be carried out by the International Joint Commission, to the end that the said commission may submit a report to the two countries covering the subject matter of this reference, together with such conclusions and recommendations as may be considered pertinent in the premises.

Question I. What further improvement in the St. Lawrence River, between Montreal and Lake Ontario, is necessary to make the same navigable for deep-draft vessels of either the lake or ocean-going type; what draft of water is recommended; and what is the estimated cost?

In answering this question the commission is requested to consider:

(a) Navigation interests alone, whether by the construction of locks and dams in the river; by side canals with the necessary locks; or by a combination of the two.

(b) The combination of navigation and power interests to obtain the greatest beneficial use of the waters of the river.

Question II. Which of the schemes submitted by the Government or other engineers is preferred, and why?

Question III. Under what general method of procedure and in what general order shall the various physical and administrative features of the improvement be carried out?

Question IV. Upon what basis shall the capital cost of the completed improvement be apportioned to each country?

Question V. Upon what basis shall the costs of operation and maintenance be apportioned to each country?

Question VI. What method of control is recommended for the operation of the improved waterway to secure its most beneficial use?

Question VII. Will regulating Lake Ontario increase the low-water flow in the St. Lawrence Ship Channel below Montreal? And if so, to what extent and at what additional cost?

Question VIII. To what extent will the improvement develop the resources, commerce, and industry of each country?

Question IX. What traffic, both incoming and outgoing, in kind and quantity, is likely to be carried upon the proposed route both at its inception and in the future, consideration to be given not only to present conditions, but to probable changes therein resulting from the development of industrial activities due to availability of large quantities of hydraulic power?

Pending the receipt of plans, estimates, and other engineering data necessary for the final consideration of this reference, the commission is requested to hold such public hearings as may be considered necessary or advisable in order to obtain all information bearing, directly or indirectly, on the physical, commercial, and economic feasibility of the project as a whole . . .¹³⁵

Subsequent to this reference the Government of the United States appointed on January 30, 1920, Lieutenant Colonel W. P. Wooten, of the Corps of Engineers of the United States Army, and Canada appointed on April 14, 1920, W. A. Bowden, Chief Engineer of the Department of Railways and Canals, to assist in the engineering phase of the investigation.¹³⁶

From the terms of the reference it is obvious that the two governments desired to secure "from the waters of the

¹³⁵ *Report on the St. Lawrence Navigation and Power Investigation* (Washington, 1921), pp. 9-10.

¹³⁶ *Report on the St. L. R. I.*, p. 10.

upper St. Lawrence their maximum efficiency in navigation and power".¹³⁷ The Commission, therefore, was bound, before forming its conclusions and recommendations, to sift all possible evidence that related either to the economic or engineering aspect of the question. While therefore the engineers were conducting their examinations, the Commission was holding its own sessions with the object of accumulating economic data. The Commission says in this connection that "even a preliminary survey of the question made it clear that no intelligent consideration could be given to the development of the maximum efficiency of the upper St. Lawrence without at the same time taking into account the whole system of the Great Lakes and their outlet to the sea".¹³⁸ Not only that; the Commission realized that in order to arrive at valid conclusions its examination should also cover the territories "economically tributary to the Great Lakes". In brief, investigation involved the wealth and welfare of a large population distributed on both sides of the boundary line "between the Atlantic seaboard and the Rocky Mountains". It appears necessary, therefore, to give a brief sketch of the physical characteristics of the St. Lawrence River for a clear understanding of the problem.

The St. Lawrence River

The St. Lawrence River proper may be regarded as beginning from Lake Ontario, although geographically its source seems to be "at the head of St. Louis River, at the extreme end of Lake Superior, 1,870 miles from the Gulf".¹³⁹ The St. Lawrence basin is a "great transverse valley, 309,500 sq. miles in area, extending from the Gulf

¹³⁷ *Ibid.*, p. 11.

¹³⁸ *Ibid.*, p. 12.

¹³⁹ Report, *St. L. R. I.*, p. 15.

of St. Lawrence into the heart of the continent",¹⁴⁰ enveloping within itself the Great Lakes and rivers in the boundary waters system. The St. Lawrence River proper, however, is a "noble stream flowing from one to three miles in width from Lake Ontario to the city of Quebec", and from there widening more and more until it empties into the Gulf of St. Lawrence in the Atlantic Ocean. "The river is navigable for all classes of vessels down to Prescott, where the Gallops Rapids begin. Below these are the Rapide Plat¹⁴¹ and the Long Sault, the latter immediately above Cornwall. Lake St. Francis follows, and between that lake and Lake St. Louis are three series of rapids, the Coteau, Cedars and Cascades. The last rapids are the Lachine and a minor fall at Montreal known as St. Mary Current. No rapids break the course of the river below Montreal. The tide is first felt at Three Rivers. Opposite Quebec the river forms a deep basin, one of the great natural harbors of the world."¹⁴² The river is 1,185 statute miles in length from Lake Ontario to Belle Isle Strait, and from that Strait to Montreal, which is the head of ocean navigation, it has a distance of 1,003 statute miles.¹⁴³ Of its tributaries on the northern side, the Ottawa River, 685 miles long, rising in the eastern vicinity of Lake Nipising, is the most noted. This river empties its dark waters into the bright blue of the St. Lawrence near Montreal; the St. Maurice joins at Three Rivers, while the Batiscan, St. Anne, Jacques Cartier, the Saguenay and several other tributaries empty down toward the Gulf. Of its southern tributaries the important ones are the Richelieu which brings the waters of Lake

¹⁴⁰ *Ibid.*

¹⁴¹ See New York and Ontario Power Co. case; Docket no. xiv.

¹⁴² Report, *St. L. R. I.*, p. 16.

¹⁴³ Ritter, Alfred H., *Transportation Economics*, p. 11, Washington, 1925.

Champlain and Lake George, the St. Francis, Yamaska and Chaudiere.¹⁴⁴

The Section under Investigation

The distance from Lake Ontario to Montreal—the section under consideration—is 132 statute miles, of which 46 miles “are in six lateral canals having a depth of 14 feet and lock dimensions of 270 by 45 feet for the system as a whole”.¹⁴⁵ These canals are separated by stretches of navigable water, so that at present ocean vessels with a draft of 30 feet may reach only as far as Montreal. This distance between the lake and Montreal has been for natural reasons divided into five sections: tracing downstream they are, (1) the Thousand Islands section, about 67 miles in length, stretching from the lake to Chimney Point, about three miles from the American and Canadian cities of Ogdensburg and Prescott respectively; (2) the International Rapids section, which is 48 miles long and is a combination of rapids and swift water running from Chimney Point to the head of Lake St. Francis; (3) Lake St. Francis, 26 miles in length;¹⁴⁶ (4) the Soulangier section, extending from the deep waters of Lake St. Francis through 18 miles of rapids until it reaches the deep waters of Lake St. Louis; and finally (5) the Lachine section, including Lake St. Louis and the various shoals and rapids that lead up to the harbor at Montreal after a flow of 23 miles.¹⁴⁷

From this division it may be seen that the first two sections follow the international boundary line between the

¹⁴⁴ *Ibid.*, p. 16.

¹⁴⁵ Ritter, *op. cit.*, p. 12.

¹⁴⁶ Ritter seems to place this distance as 31 miles, see p. 12; Dr. Moulton places it as 26 miles, see footnote *infra*.

¹⁴⁷ Moulton, Harold G., *The St. Lawrence River Navigation and Power Project* (Washington, 1929), p. 26.

United States and the Dominion of Canada, that is to say, the boundary between the State of New York and the Province of Ontario. It is in sections two, four and five that major improvements are needed.¹⁴⁸

Improvements Effected Prior to Investigation

1. The St. Lawrence Ship Channel

This channel between Montreal and Quebec was constructed in 1825; since then it has been deepened on various occasions.¹⁴⁹ The most important improvement was started in 1899 when work was begun on a 30-foot channel which was to be widened to a minimum width of 450 feet. In 1910 the Department of Marine and Fisheries of Canada "began work in the upper divisions of the river to increase the depth of the channel to 35 feet".¹⁵⁰ At the time of the report of the Joint Commission this work had not been finished;¹⁵¹ "something over 40 miles had been completed to 35 feet and the Canadian Government had expended till March 31, 1921, an amount of \$23,867,967."¹⁵²

2. Canals between Montreal and Lake Ontario

The first lock canals are said to have been built between Lake St. Louis and Lake St. Francis, around the rapids, in 1783 by the Royal Engineers. The locks were 120 feet in length, 9 feet in width, with 6 feet of water on the sill.¹⁵³ The Lachine Canal was opened in 1825, 48 feet wide at the surface and 4½ feet deep. This canal was provided with seven locks, each of which was 108 feet long and 20 feet

¹⁴⁸ *Ibid.*

¹⁴⁹ Report, *St. L. R. I.*, pp. 17-20.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

wide, "built of masonry". In 1832 the St. Lawrence Canals were deepened to 9 feet. The Cornwall Canal was started in 1834, but the rebellion of 1837-38 hindered its construction, so that it could be completed only in 1843, with locks 200 feet long, 55 feet wide, with 9 feet of water on the sill.¹⁵⁴ From 1871 onwards these canals have been occasionally deepened, so that "vessels 260 feet long, 44-foot beam, can pass between Montreal and Lake Superior, loaded down to about 14 feet".¹⁵⁵ The total expenditure on the various St. Lawrence Canals was, up to March 31, a sum of \$54,626,138.77.¹⁵⁶

Consideration should perhaps be given here to the several important canals on both sides of the boundary connecting the Great Lakes with the St. Lawrence River; but this survey must be omitted because the investigation called for was primarily on the section of the St. Lawrence between Lake Ontario and Montreal. Consequently canals like the Welland Canal¹⁵⁷ completed by Canada in 1930, connecting Lake Ontario and Lake Erie, the New York Barge Canal¹⁵⁸ connecting Buffalo on Lake Erie with Albany on the Hudson River, as well as Oswego on Lake Ontario, the canals at Sault Ste. Marie¹⁵⁹ and a host of others are not accorded special treatment except in places where some of them inevitably appear. So also no space is devoted to the various channel improvements which had been effected by the two Governments prior to the investigation, in the St. Mary's River, the St. Clair River, the Detroit River and the Niagara River,¹⁶⁰ nor to

¹⁵⁴ *Ibid.*, p. 21.

¹⁵⁵ *Ibid.*; for canals in general see pp. 20-41.

¹⁵⁶ *Ibid.*, p. 23.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, pp. 35-36.

¹⁵⁹ *Ibid.*, pp. 24-26.

¹⁶⁰ *Ibid.*, pp. 41-44.

improvements effected by the United States in about 90 harbors on the Great Lakes and by the Dominion in about 70 ports.¹⁶¹

How the Joint Commission conducted its Inquiry

Almost eight weeks subsequent to the reference of the St. Lawrence question by the two governments the Joint Commission met at Buffalo, N. Y., on March 1, 1920, and held "a preliminary hearing" during which opinions were obtained from "representatives of various commercial and other organizations as to the general scope of the investigation and the main aspects of the problem".¹⁶² Before the Commission held this hearing, however, it had, as an initial step towards "marshalling the evidence", gotten together "a series of briefs covering material already available in printed or other documentary form bearing upon the subject matter of the investigation".¹⁶³ After the Buffalo hearing, several more were held on both sides of the boundary at points ranging between Boston, New York and Montreal in the east and Boise and Calgary in the west, at which, according to the Commission, "everyone interested in the investigation", whether he was for or against the project, "was given the fullest possible opportunity of submitting facts or opinions bearing upon the subject matter of the reference".¹⁶⁴ The Commission moreover obtained the services of statistical experts from both Washington and Ottawa who analyzed and checked all the statistical evidence submitted at the hearings. The various engineering and economic reports and testimony offered to the Commission along with a number of plans and maps, excluding the re-

¹⁶¹ *Ibid.*, for Harbor and other improvements see pp. 44-45.

¹⁶² *Ibid.*, p. 12.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

port of the Consulting Engineers, consisted of 12 volumes of appendices. These appendices, however, do not seem to have been published as yet by the governments.¹⁶⁵

While the Commission was conducting its hearings, the engineering board, as has been already pointed out, had been holding its examinations and study of the problem. It submitted its entire report to the Commission by August 24, 1921. Meanwhile between August 15 and 18, the Commission with the members of the engineering board made "a careful inspection of the St. Lawrence from Lake Ontario to Montreal with particular reference to the points at which works were recommended" in the text of the report, which had been submitted by the engineers on July 2, 1921.¹⁶⁶ Up to that time the Commission had been studying the reports and plans; as a result the Commission felt that sufficient opportunity for study should be given to all engineers interested in the improvements, and for that purpose copies of these documents were made available in the offices of the Commission in Washington and Ottawa as well as in the office of the United States Corps of Engineers at Detroit. A period of 30 days was allowed from the 20th of August within which any interested party could examine these materials, and another ten days within which to file any brief containing criticism, comment or alternative plans, or anything that had a bearing upon the subject. The Hydro-Electric Power Commission of Ontario wanted an extension of time, which was granted, for submitting certain "alternative schemes".¹⁶⁷ Thus it appears a complete opportunity was given to all conceivable parties to present their views, however favorable or otherwise they might be in relation to the proposed scheme of improving the St. Lawrence below Lake Ontario to Montreal.

¹⁶⁵ *Ibid.*, p. 7.

¹⁶⁶ *Ibid.*, p. 12.

¹⁶⁷ *Ibid.*, p. 13.

At this juncture, before considering the conclusions and recommendations of the Joint Commission, it may perhaps be in place to take a bird's-eye view of the arguments pro and con involved in this colossal engineering and economic problem of the development of the St. Lawrence.

1. Arguments For

If the ponderous wealth of literature on this heavily-debated question is digested, at least three main arguments appear for the improvement of the St. Lawrence Waterway. The first is that the congested railroads do not adequately meet the agricultural and other productive demands of the west and mid-west regions of the North American continent. This argument seems to have played an important part during the War period of 1914-1918. While this argument is "usually made with reference to conditions in the United States",¹⁶⁸ some have stretched it to apply to Canada also. The Secretary of the Port Arthur Grain Exchange is alleged to have said that "the most difficult problem that our country and the United States have to face in the next decade is to make transportation keep pace with production. Production we believe is ready and waiting to jump forward with a bound."¹⁶⁹ In other words, if transportation facilities are improved, production will increase; if not, production will be tied up and suffering. Consequently the present railroad congestion should be lessened.

The second argument seems to be that the development of the St. Lawrence will mean a reduction in transportation charges, because at the present time there is a large volume of trade moving "between the territory to be served by this waterway (St. Lawrence) and the seaboard, both in foreign and domestic trade".¹⁷⁰ Although it is scarcely possible to

¹⁶⁸ Moulton, *op. cit.*, p. 4.

¹⁶⁹ Quoted in *ibid.*, p. 5.

¹⁷⁰ Ritter, *op. cit.*, p. 276.

predict with any degree of precision what percentage of this large volume will move by the waterway, there seems no doubt but that the greater portion of it, being "commodities of a nature which will take advantage of reduced means of transportation costs",¹⁷¹ will possibly choose the waterway in preference to any other means of transportation. Of the approximate total of 30,000,000 tons of annual freight, which may be regarded as "interested traffic" in the project, it is hard to say what proportion will move by the waterway; "the indicated savings are sufficient, however, to warrant the belief that a large part of it will be benefited either directly, through the use of the waterway, or indirectly through the influence which the waterway will exert on rates via competing routes".¹⁷² Agricultural products will be the ones that will be specially benefited, because the waterway will not only reduce the cost on grain shipping by amounts ranging from seven to twelve cents on every bushel the American farmer exports, but also such a saving would be conducive to a "substantial enhancement of the domestic price of all the grain produced in the tributary territory. Estimates of the yearly aggregate benefit to grain producers vary from \$240,000,000 to \$366,000,000."¹⁷³ The United States Commission on the St. Lawrence has reported that "the values in a single year to the farmers alone would equal the capital cost of the waterway".¹⁷⁴ While the farmer is thus benefited, the waterway will bring "the Middle West, with its 40,000,000 people, its 70% of agri-

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Moulton, *op. cit.*, pp. 5-6.

¹⁷⁴ *Ibid.*; this commission was appointed by President Coolidge, on March 14, 1924, to investigate the St. Lawrence project; see "St. Lawrence Waterway Project", Senate Document No. 183, 69th Cong., 2nd Sess.

cultural production, its 45% of total wealth, its more than 40% of total production closer in transportation costs to the markets of the world. It reduces the cost of moving freight to and from the Middle West by an estimated \$4 per ton."¹⁷⁵ There are various other reasons that might be cited here for the opening of the waterway from the standpoint of transportation costs alone, but necessarily they are omitted here.¹⁷⁶

The third and final argument for the waterway lies in the possible development of hydro-electric potentialities of the St. Lawrence River. The ultimate capacity of the plants to be installed is visualized as four to five million horsepower. For power purposes the total distance between Lake Ontario and Montreal may be divided into two sections; the international section, 113 miles from the lake to St. Regis, N. Y., and the Canadian section, 70 miles from St. Regis to Montreal. In the international section alone, it is pointed out, approximately 2,250,000 horsepower may be produced. "In view of the ever-increasing demand for power in the highly industrialized region within transmission distance, it is inconceivable that this tremendous source of energy will long remain dormant."¹⁷⁷ Even the State of New York, which opposes the waterway project is not unfavorably disposed toward the power project. The New York Governors have said or done enough to prove their interest in the development of the St. Lawrence power. In

¹⁷⁵ Quoted in Moulton, *op. cit.*, p. 6, from the Great Lakes-St. Lawrence Ship Channel Facts and Clip Sheet for Editors, August 7, 1925 (Washington, D. C.).

¹⁷⁶ See *ibid.*, pp. 5-8.

¹⁷⁷ Speech of U. S. Senator Thomas F. Walsh before the 25th Convention of the National Rivers and Harbors Congress, Washington, D. C., December 11, 1929, published also by the Great Lakes-St. Lawrence Tidewater Association under the title, "A Major Impending Project", Bulletin no. 48 (Washington, Jan. 1930), pp. 7, 11, 12.

1921 the Honorable Nathan Miller, then Governor of the Empire State, in a speech in which he assailed the project, said nevertheless that: "As a water-power project it undoubtedly is economically sound, and I hope the time is not far distant when that tremendous power in the St. Lawrence as well as more power in the Niagara shall be harnessed for the benefit, not of some power company, but of the people who own that water power."¹⁷⁸ In recent years both ex-governor Alfred E. Smith, and the present Governor, Franklin D. Roosevelt, have made the hydroelectric resources of the State of New York, including those of the St. Lawrence, "first in importance by the public rather than by private interests, outstanding policies of their respective administrations and both have sought legislative action for such policy".¹⁷⁹

Finally, it is said that there is a question of sentiment in the entire scheme. "There is, indeed", says one writer, "more than immediate economic need behind the Middle Westerner's belief in the St. Lawrence Waterway. There is ambition. Our eternal American ambition to become greater than we are; the ambition of Duluth to grow as big as Milwaukee, of Milwaukee to outstrip Detroit, of Detroit to be a second Chicago—by some magic of water transport, of freedom to the markets of the world. There is pride. The Great Lakes city wants to be able to say: "We take no second place to New York. We too are a seaport town." And there is the fascination of the sea itself, the pathway to the ends of the earth. The Middle Westerner has a vision of the flags of Cuba and Holland and England and the Argentine and Japan coming over his horizon, and of

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid*

being able to go down to the dock and smell the smells of the Orient.”¹⁸⁰

Arguments Against

Opposition to the St. Lawrence Waterway is chiefly confined, on the American side, to New York, Buffalo, Baltimore and Philadelphia. These seaboard cities are primarily opposed to any diversion of American traffic to Canadian ports. New York, with Buffalo, has opposed the waterway scheme whenever it has been brought up, “while at the same time carrying on a fight with its neighbors—Boston, Philadelphia, and Baltimore—first for supremacy and then against the insistent efforts of these ports to retain an important share of the nation’s foreign commerce.” Nevertheless all these cities are united to fight the diversion of American trade to Canadian ports.

Buffalo is strongly opposed to the waterway because its opening is viewed with great pessimism from the standpoint of her grain trade. Out of the entire grain movement in 1927, which was 515 million bushels, Buffalo alone had received into her elevators 259 million bushels. With the

¹⁸⁰ Waldron, Webb, *We Explore the Great Lakes*, p. 244, cited in Moulton, *op. cit.*, p. 9.

Organizations that endorse the waterway on the United States side are:

- American Bankers’ Association
- American Farm Bureau Federation
- American National Livestock Association
- Associated Industries of Massachusetts
- Chamber of Commerce of the United States
- Great Lakes Ports Association
- Lake Erie and Ohio River Canal Board
- National Association of Real Estate Boards
- National Hardware Manufacturers’ Association
- United States Grain Dealers’ Association
- West Coast Lumbermen’s Association

See Moulton, *op. cit.*, p. 10.

waterway in operation, it is pointed out, "Buffalo would be slightly off the line of traffic. . . . The New Welland Canal, as a matter of fact, is likely to have something of the same effect."¹⁸¹

The second point that arouses opposition in New York, centers around the New York Barge Canal. Over \$230,000,000 has been spent by New York State on this canal since 1905; still the canal has not proved a success economically.¹⁸² The apparent failure of this project infuses strong apprehension into the minds of people who have followed the Barge Canal developments closely, whether the opening of a larger and necessarily more expensive waterway would be a practicable endeavor, while reasonable fear seems to exist of the probability that in the event the St. Lawrence is opened, even the available traffic and compensation on the Barge Canal would possibly be hard hit. On these grounds New York interests propose that the best thing to do is to create an "All-American route", utilizing the Barge Canal route from Oswego on Lake Ontario to a point near Albany and from there down the Hudson River to New York Harbor. In that case a short canal would be required around the Niagara Falls within the United States to complete the All-American Waterway. It may be noted, however, that the Army Engineers of the United States reported, on December, 1926, that the cost of constructing this route would be considerably more than that of the St. Lawrence waterway.¹⁸³

In Canada opposition seems to center also in the eastern part of the country. The commercial port and railroad interests in Montreal, it is alleged, "stands to lose by any lessening of the importance of that city as a transportation

¹⁸¹ Moulton, *op. cit.*, p. 11, footnote.

¹⁸² *Cf. supra*, chap. i, p. 49.

¹⁸³ Moulton, *op. cit.*, p. 12.

terminus".¹⁸⁴ The reason apparently is that in case lake carriers are replaced by ocean carriers there may then be much less need for trans-shipment of goods as is at present done at Montreal. Both in Quebec and Ontario there is opposition on the question of power. These cities maintain that there is now enough and more power to meet the present needs, and if additional power is required to meet a future demand, it may be produced elsewhere than in the St. Lawrence at a cheaper cost. The fear of the Hydro-Electric Power Commission of Ontario seems to be whether the users of the power would not be affected by the cost of constructing and maintaining the St. Lawrence waterway for purposes of navigation.¹⁸⁵ Meanwhile the section of Ontario bordering the Ottawa river looks for the development of a "Georgian Bay Canal" along the Ottawa and French Rivers to Montreal.¹⁸⁶ In certain sections of Manitoba and Saskatchewan there is a desire for a proposed Hudson Bay route to Europe, "which for a generation has been held up to the Canadian Middle West as the logical outlet for grain and livestock".¹⁸⁷ The distance from the grain center of their middle-western section to Liverpool, England, is about "1,000 miles shorter than the all-water route via the Great Lakes and the Atlantic." The trouble in connection with this route seems to be that it may have approximately 15 weeks of navigation season, and "ice would be found always in the Straits".¹⁸⁸ The Province of Alberta is said to be more anxious to secure lower rail rates to Pacific ports, and is naturally therefore less vitally

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*, p. 15.

¹⁸⁶ *Ibid.*, p. 13.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*, p. 14.

interested in the St. Lawrence project.¹⁸⁹ The only two important cities that seem to express any real interest in the project are Toronto and Hamilton, which would want to become, like Chicago and Detroit, ocean ports controlling at least partly the foreign and domestic trade of the Dominion, which "now breaks cargo at Montreal".¹⁹⁰

Thus from the foregoing sections a very brief sketch is possible of the most outstanding issues involved in the St. Lawrence Waterway project. There are other factors which will in general be clear from the conclusions and recommendations of the Commission.

Conclusions of the Joint Commission¹⁹¹

1. The Commission found "nothing in the evidence" submitted to it by the different interests "to warrant the belief that ocean-going vessels of suitable draft could not safely navigate the waters in question as well as the entire waterway from the Gulf of St. Lawrence to the head of the Great Lakes, or that such vessels would hesitate to do so if cargoes were available."¹⁹²

2. It also maintained that of the several alternative routes proposed by various interests "from the interior to the seaboard" none offered "advantages comparable with those of the natural route by way of the St. Lawrence".

From the standpoint of economic practicability of the project, the Commission felt that without looking for any increment of new traffic there "exists today, between the region economically tributary to the Great Lakes and over-

¹⁸⁹ *Ibid.*, p. 15.

¹⁹⁰ *Ibid.*, p. 13.

¹⁹¹ This section is based on the Commission's report; see Report on the St. Lawrence Navigation and Power Investigation, pp. 176-184; also see pp. 155-176 for detailed information on the conclusions.

¹⁹² *Ibid.*, p. 176.

seas points as well as between the same region and the Atlantic and Pacific seaboard, a volume of outbound and inbound trade that might reasonably be expected to seek this route sufficient to justify the expense involved in its improvement."

Because America has a greater percentage of the foreign and coastwise trade at the present time than Canada, and will have "for many years to come", a larger share of the benefits will accrue to American interests—this without any skepticism on the growth of Canadian trade.

Present transportation facilities are inadequate, although in Canada railroad development is "still in advance of population and production".

The railroads have failed to cope with the "phenomenal growth of population and industry throughout the middle western and western States". The solution lies, in the opinion of the Commission, in the utilization of every practicable means of transportation, "particularly of the wonderful natural waterway extending from the Atlantic into the very heart of the continent, together with the development of such a system of cooperation between railways and waterways as would at one and the same time bring the load the railways have to carry within practicable limits, and give the West an additional route for its foreign and coastwise trade". In support of this conclusion the Commission pointed out that Great Britain's "phenomenal industrial development" has been considerably due to her "ready access to the sea". Great Britain has no resources of iron, yet she built up gigantic steel industries; she grows no cotton, yet she supplies half the world with cotton goods; she produces very little wool, yet her woolen mills have developed into an enormous industry. Her merchant marine sails the seven seas, bringing to her shores the raw products. The sea, that most efficient, most adaptable, most far-

reaching, most economical of thoroughfares, possessing practically all the advantages of land transportation with few of its disadvantages, has made Great Britain prosperous.

"And what water transportation has done for Great Britain it has done in greater or less degree for other nations in other times. Access to the sea gave the diminutive Republic of Venice preeminence in the Mediterranean. It transformed little Holland from a comparatively obscure province into a great maritime nation. It gave to Spain her period of greatness. It brought Germany before the war within almost measurable distance of supremacy in the foreign trade of the world."¹⁹³ Consequently the Commission concluded that the regions economically tributary to the Great Lakes, with its vast and unlimited resources, both natural and industrial, "can hardly fail to become an even greater factor in the world's markets than it is today if given a practicable and efficient water route to the sea".

Railways and waterways should cooperate to relieve congestion. In Canada the Canadian Pacific Railway maintains in conjunction with her rail system a line of steamers not only on the Atlantic and Pacific but also on the Great Lakes.

In the matter of distribution of costs, under the existing differences of population, wealth and usefulness of the waterway, between the two countries undertaking the improvements, the Commission felt that a fair plan for the time being would be "to divide cost" of financing the project "in proportion to the benefits each receives". In other words, the Commission concluded that, subject to periodical adjustment of the ratio, "each country should be debited with its share of the entire cost of all the works necessary for navigation, including the cost of the Welland Ship Canal [Canada opened this canal in 1930], based upon the proportion . . . [which its] cargo tonnage carried to

¹⁹³ *Ibid.*, p. 177.

and from its own ports by way of the St. Lawrence bears to the entire tonnage by the same route".¹⁹⁴

Water power capable of development in the international section of the St. Lawrence should be so apportioned as to charge each country with such "quantities of power" as may be set aside to meet the requirements of plants already in existence.

The cost of power works, such as superstructures, machinery, plant, etc., necessary for developing power, in the international section, should be borne equally by both countries, since each is entitled to one-half of the power produced in that section. These works should be controlled by the country in which they may be located.

All navigation works which are wholly located in the territory of one country should be controlled by that country, but where there are works in the international section, they should be under the control of an international board of control on which both countries should be equally represented. In addition this board should have power to inspect the national navigation works in order to "insure economy and efficiency".¹⁹⁵

Before any plan is adopted the Commission felt that the two governments should refer all the engineering data on the plan "to a special technical board for careful consideration and report".

Recommendations of the Joint Commission

In consonance with the above conclusions the Commission recommended that:

(1) The two governments should enter into a treaty for a scheme of improvement of the St. Lawrence River between Montreal and Lake Ontario.

¹⁹⁴ *Ibid.*, pp. 178-179.

¹⁹⁵ *Ibid.*, p. 180.

(2) The New Welland Ship Canal be considered as a part of such a scheme.

(3) The whole project be once again studied from the engineering point of view.

(4) An "exhaustive investigation" should be made on the question of the "damage through flowage involved in the plan of development finally adopted".

(5) With a view to bringing each of the power houses onto its own side of the boundary, "appropriate steps be taken to transfer to one country or the other, as the case may be, the slight acreage of submerged land involved".

(6) Canada should complete the New Welland Ship Canal according to her own plans.

(7) An "International board" be created jointly by the two governments with equality of representation.

(8) Although each country should control the navigation works wholly within its territory, the international board should be given the right to inspect such works.

(9) Power works do not require international control.

(10) Except as set forth in recommendation (11), "the cost of all 'navigation works' be apportioned between the two countries on the basis of the benefits each will receive from the new waterway: *Provided*, That during the period ending five years after completion of the works—and to be known as the Construction Period—the ratio fixing the amount chargeable to each country shall be determined upon certain known factors, such as the developed resources and foreign and coastwise trade of each country within the territory economically tributary to the proposed waterway, and that that ratio shall be adjusted every five years thereafter and based upon the freight tonnage of each country actually using the waterway during the previous five-year period." ¹⁹⁶

(11) "That the cost of 'navigation works' for the com-

bined use of navigation and power over and above the cost of works necessary for navigation alone should be apportioned equally between the two countries.”¹⁹⁷

Thus the Commission investigated, reported and recommended on one of the most herculean engineering and economic projects the world ever heard of. Since the report of the Commission both the United States and Canada individually and jointly have conducted several investigations. For the purposes of this paper these investigations and their results may be omitted.¹⁹⁸

V. *Levels of Rainy Lake Investigation*

On February 24, 1925,¹⁹⁹ as has already been pointed out elsewhere, the Governments of the United States and Canada concluded a treaty and protocol for the regulation of the levels of the Lake of the Woods, as a practical sequence to the report of the Joint Commission on the levels of that lake. On the occasion of the signing of that treaty the plenipotentiaries agreed that the two Governments should refer to the Commission the question of the levels of the Rainy Lake and other upper waters. That Rainy Lake has a close relation with the Lake of the Woods has already been noticed; nevertheless in the interest of clarity it appears necessary to give a very brief geographical sketch of the lake and its adjoining regions.

Rainy Lake has an area of 345 square miles. It has a

¹⁹⁷ *Ibid.*

¹⁹⁸ For a substantial article, maps, and tables, see Leslie R. Thomson, M. E. I. C., "The St. Lawrence Problem: Some Canadian Economic Aspects", *The Engineering Journal* (Montreal), April, 1929, vol. xii, no. 4. The bibliography is especially valuable and comprehensive.

¹⁹⁹ See Treaty and Protocol between the United States and Canada, Feb. 24, 1925; U. S. Treaty, Series No. 721; also see *Papers of the I. J. C.*, p. 84.

drainage area of 14,500 sq. mi., of which 4,400 sq. mi. are in Minnesota and the remainder in the province of Ontario. "Along the International Boundary the drainage commences in North Lake and flows through Gunflint Lake into Lake Saganaga."²⁰⁰ The outlet of Rainy Lake has been controlled artificially since March, 1909; the flow is through the Rainy River into Lake of the Woods, and thence down the Winnipeg River into Lake Winnipeg. Of the land along the boundary line above Rainy Lake, there is a relatively small percentage suitable for cultivation. Logging seems to be the natural pursuit in these regions, while the Lake and connecting waters are from year to year increasing in their fascination as a resort of both sportsman and tourist.²⁰¹ Rainy Lake can be reached by railroads at the towns of International Falls, Minnesota, and Fort Frances, Ontario, both of which towns are located in the western extremity of that lake.²⁰²

With a view to regulating the levels of Rainy Lake and other allied upper waters, the Governments of the United States and the Dominion of Canada sent identical letters of reference, dated February 27, 1925, that is, three days after the signing of the Lake of the Woods Protocol, to the International Joint Commission asking it to examine, report and recommend on the following questions:

Question 1: In order to secure the most advantageous use of the waters of Rainy Lake and of the boundary waters flowing into and from Rainy Lake, for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes; and in order to secure the most advantageous use of the shores and harbours

²⁰⁰ Preliminary Report to the International Joint Commission. . . re Levels of Rainy Lake and other Upper Waters (Ottawa, 1930), p. 12.

²⁰¹ *Ibid.*

²⁰² *Ibid.*, pp. 32-33.

of both Rainy Lake and the boundary waters flowing into and from the lake, is it, from an economic standpoint, now practicable and desirable, having regard for all or any of the interests affected thereby, or under what conditions will it become thus practicable and desirable . . .

(a) To regulate the level of Rainy Lake in such a manner as to permit the upper limit of the ordinary range of the levels to exceed elevation 1108.61 sea-level datum?

(b) To regulate the level of Namakan Lake and the waters controlled by the dams at Kettle Falls in such a manner as to permit the upper limit of the ordinary range of the levels to exceed elevation 1120.11 sea-level datum?

(c) To provide storage facilities upon all or any of the boundary waters above Namakan Lake?

Question 2: If it be found practicable and desirable thus (1) to regulate the level of Rainy Lake, and / or (2) to regulate the level of Namakan Lake and the waters controlled by the dams at Kettle Falls, and / or (3) to provide storage facilities upon all or any of the boundary waters above Namakan Lake—

(a) What elevations are recommended?

(b) To what extent will it be necessary to acquire lands and to construct works in order to provide for such elevations and / or storage, and what will be their respective costs?

(c) What interests on each side of the boundary would be benefited? What would be the nature and extent of such benefit in each case? How should the cost be apportioned among the various interests so benefited?

Question 3: What methods of control and operation would be feasible and advisable in order to regulate the volume, use and outflow of the waters in each case in accordance with such recommendations as may be made in answer to questions 1 and 2?

Question 4: What interests on each side of the boundary are benefited by the present storage on Rainy Lake and on the waters controlled by the dam at Kettle Falls? What are the nature and extent of such benefits in each case? What is the cost of such storage and how should such cost be apportioned among the various interests so benefited?

Each government will appoint from its public service such engineering and other technical assistance as may be necessary to enable the commission to make the desired examination and submit their report.²⁰³

In accordance with the last paragraph of this reference, the governments appointed members of their respective engineering staffs to assist in the examination of the questions.²⁰⁴ Subsequent to the appointments, the Joint Commission held a hearing at International Falls, September 28-30, 1925, at which all parties interested favorably or otherwise in the proposed scheme of lake regulation were accorded ample opportunity to present their cases. The following year the engineers assisting the Commission submitted, according to the direction of the Commission, a report at a meeting which the Commission held in New York in January, 1926. In this report the engineers gave an estimate of the funds and time needed for the collection of data bearing upon the engineering phase of the reference. As a result of this report the Commission directed the engineers to proceed with their investigations. "Accordingly, the necessary triangulation, contouring, metering, gauge reading, evaluation, and timber cruising were thereupon commenced by the engineering forces of both governments. These were completed in the summer of 1928. Based on these data, preliminary hydraulic computations have been made, the topographic maps have been completed, and detailed surveys of certain possible sites of control structures have been platted. No engineering conclusions have yet been reached."²⁰⁵

²⁰³ *Ibid.*, pp. 7-8.

²⁰⁴ Canada appointed Mr. Stuart S. Scovil of the Dominion Water Power and Reclamation Service, and the United States first appointed the District Engineer, Duluth, Minn., then the following officers of the U. S. Corps of Army Engineers: Majors E. H. Marks, C. F. Williams, R. N. Crawford, and P. C. Bullard.

²⁰⁵ Preliminary Report, Levels of Rainy Lake Investigation, pp. 8-9.

On October 2, 1928, however, the Commission met at Ottawa to hear from the engineers. The latter reported that the field investigations had been practically completed but that more time would be required to submit any final engineering reports. The Commission, nevertheless, realized "that there was a public demand for the release of basic physical data pertaining to the watershed and thereupon directed their engineers to submit a report", consisting only of such data as were obtained through their field investigations. In conformity with this direction a "Preliminary Report" was issued subsequently. No final report has yet been made by the engineers to the Commission, nor by the Commission to the Governments embodying its report, conclusions or recommendations. The final results are still pending.

VI. Trail Smelter Investigation

This investigation appears to be fundamentally different from all the previous investigations. Heretofore every question referred to the Joint Commission related in some manner or form to boundary waters; but in the present instance boundary waters do not play any part. The reference, nevertheless, fell under Article IX because that Article covers the entire international boundary from the Atlantic to the Pacific; that is, it includes in the phrase "the common frontier"²⁰⁶ not only the water boundary but also the land boundary, and therefore any questions involving the rights, obligations or interests of either party arising anywhere in the international boundary may be referred under the provisions of Article IX.

Subject matter of the present reference

At Trail, British Columbia, the Consolidated Mining and Smelting Company of Canada, Limited, erected a plant, the

²⁰⁶ Article IX, Treaty of 1909; see *infra*, appendix A.

first one of a set of three, for manufacturing sulphuric acid, each plant having a capacity of 112 tons output per day. The second plant the company had proposed to install in May, 1931, and the third in August of the same year.

The installation of the first plant caused substantial damages on the United States side of the boundary in Stevens County, in the State of Washington. It was alleged that the sulphur dioxide (SO_2) fumes ejected from the stacks of the company traversed the boundary into the United States territory and inflicted appalling injury to cultivated crops and orchards in Upper Columbia Valley.²⁰⁷ During 1927-1929 it was observed that there was a continuous spread of the extent of injuries down and outward from the Columbia Valley, "indicating the progressive enlargement of the fume zone". In many districts crops suffered severely.²⁰⁸ Analysis of the virgin soils along the Columbia River, it was charged, showed, that "an abnormally acid condition has developed between the boundary and Northport. South of Northport the soils are only slightly acid."²⁰⁹ It was further alleged that, apart from the direct effect of sulphur dioxide fumes on chemical conditions of the soil, there would "follow the destruction of native vegetation, and, subsequently, the erosion of the soils upon the mountain and hill slopes".²¹⁰ Furthermore the effect of the fumes on forest trees was "a rapid killing and reddening or browning of portions of all or part of the leaves or needles, resulting in defoliation".²¹¹ In brief, the injury had reached such pro-

²⁰⁷ *Trail Smelter Reference*, Publications of the Department of State (U. S.) (Washington, 1930), Statement on behalf of the Government of the United States before the International Joint Commission, p. 7.

²⁰⁸ *Ibid.*, p. 8.

²⁰⁹ *Ibid.*, p. 18.

²¹⁰ *Ibid.*, p. 19.

²¹¹ *Ibid.*, p. 21.

portions that it called for instant investigation, report and recommendation—if possible, for compensation.

On August 7, 1928, the Governments of the United States and Canada referred a series of questions under Article IX to the Joint Commission. They were:

1. The extent to which property in the State of Washington has been damaged by fumes from smelter at Trail, British Columbia.
2. The amount of indemnity which would compensate United States interests in the State of Washington for past damages.
3. Probable effect in Washington of future operations of smelter.
4. Method of providing adequate indemnity for damages caused by future operations.
5. Any other phase of problem arising from drifting of fumes on which Commission deems it proper or necessary to report and make recommendations in fairness to all parties concerned.

Subsequently the Commission met at Northport, Washington, in October, 1928, and at Nelson, British Columbia, in November 1929. During the first two months of 1930 extensive hearings were held in the city of Washington, and testimony was taken from scientific experts of the American Government who had visited Stevens County. Experts were examined on behalf of the Canadian Government also. Along with these, the representatives of the Smelting Company, officials of Stevens County and residents of the localities, were given opportunity to submit their sides of the case. Both Governments then filed their respective briefs with the Commission, the United States, through counsel,²¹² stressing particularly the fact that under the Constitution of the United States and the Constitution of the State of Washington and also in the light of the principles of international

²¹² Mr. James Oliver Murdock.

law, the rights of the people of Stevens County should be protected, and towards that end counsel made the submission that "sound judicial discretion warrants the view that a proper recommendation . . . is that restrictions be placed on the quantity and quality of gas discharged and that damages should be assessed and paid, for injuries which have already occurred".²¹³

The Commission's answers

I. The Commission's answers to the questions of references were signed at Toronto, February 28, 1931. They were, briefly:

1. Regarding the extent of territory damaged: the Commission reported that "the territory affected" by the fumes could be found "within three zones" which were indicated by a map appended to the report.²¹⁴

2. On the question of indemnity the Commission submitted that: "In view of the anticipated reduction in sulphur fumes discharged from the smelter at Trail during the present year²¹⁵ . . . the Commission . . . has deemed it advisable to determine the amount of indemnity that will compensate United States interest in respect to such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of \$350,000. Said sum however shall not include any damage occurring after January 1, 1932."²¹⁶

3. On the probable effect of fumes in the future in the State of Washington the Commission reported that if the

²¹³ *Trail Smelter Reference, op. cit.*, p. 65; for a brief resume of the case, see *A. J. I. L.*, July, 1931, vol. 25, no. 3, p. 540.

²¹⁴ *Ibid.*, pp. 540-541; the map does not seem to have yet been published.

²¹⁵ 1931.

²¹⁶ *American Journal of International Law, A. J. I. L., loc. cit.*, p. 541.

Smelting Company would adopt the recommendations made by it for the operation of the plants, "the damage from such fumes should be greatly reduced, if not entirely eliminated, by the end of the present year".²¹⁷

4. Whenever the claim of a person for damages occurring "after the first day of January, 1932", has not been adjusted by the Smelting Company "within a reasonable time", the Governments of the United States and the Dominion "shall determine the amount of such damage, if any, and the amount so fixed shall be paid by the Company forthwith".²¹⁸

5. On the fifth question, relating to "any other phase" of the drifting fumes, the Commission took some pains to make certain "recommendations in fairness to all parties concerned":

a. The Company should complete and install all its units as expeditiously as possible in order to reduce the amount and concentration of SO₂ fumes to a "point where it will do no damage in the United States".²¹⁹

b. The Governments should appoint scientists "to study and report upon the effect of the works erected and contemplated", on the fumes drifting to the American territory, and also on "such further or other actions, if any, as such scientists may deem necessary on the part of the Company to reduce the amount and concentration of such fumes to the extent hereinbefore provided".²²⁰

c. When the Company reports to the Canadian Government that the fumes have been brought down to a point of non-injury, that Government "shall thereupon forthwith notify" the United States Government which may then take

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*, p. 542.

²²⁰ *Ibid.*

up the matter for investigation with the Dominion Government and establish whether or not the fumes have been so reduced as to render them harmless.²²¹

d. The United States Government may at any time take up for consideration with the Canadian Government the question of whether or not the Company is "proceeding with expedition" on its contemplated works.

e. If the conditions prescribed by the Commission "are fully met", then "there will be no future indemnity" except in certain cases.

f. "Any future indemnity will arise only if and when these conditions and recommendations stated under Question 5, are not complied with and fully met, and then only in respect of any damage done after the first day of January, 1932. . . ." ²²²

g. The word "damage" would include only such damage as both Governments "may deem appreciable" and for purposes of paragraphs (a) and (c) "shall not include occasional damage that may be caused by SO₂ fumes carried over the international boundary." in air pockets or by reason of unusual atmospheric conditions". But "any damage in the State of Washington howsoever caused by said fumes on and after January 1, 1932, shall be the subject of indemnity by the company . . ." ²²³

Further Recommendations

II. The specified indemnity of \$350,000 should be "paid into the Treasury of the United States and shall be held as a trust fund for the use and benefit of persons having suffered damages as hereinbefore mentioned". Further, the Governor of the State of Washington should appoint a "bonded

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*, p. 543.

administrator" or "such other person" who should "confer and advise" with the members of the American section of the Joint Commission. This officer "shall have access to all claims and other information" that may be in the custody of the American section; he should also compile "a detailed list of awards made to various persons damaged" by the fumes and he should allot "to each individual claimant that part of the . . . \$350,000" to which that individual is entitled. "Said administrator or other person shall be the sole and final judge of all questions referred to him, and no appeal shall lie from his decisions".²²⁴

III. No special damages are included in the above \$350,000 for indemnity "to the land of the Government of the United States" because "no claim was presented". Consequently the Commission found such claim has "been waived".

IV. No indemnity should be given "for alleged loss of taxes" by reason of the fumes to Stevens County.

V. Also no indemnity "for alleged loss of trade by business men or loss of clientele or income by professional men resident" in Northport, Washington.

Whether or not the two Governments will finally adopt the report and recommendations of the Commission remains to be seen. Nevertheless serious international misunderstanding which might have resulted from this difficulty has been prevented by the services of the Commission.

The circumstances attending the Trail Smelter investigation seem to invest it with the characteristics of a court proceeding, culminating eventually in a decision, although, indeed, the fact should not be lost sight of entirely that under the provisions of Article IX of the treaty of 1909, the Commission has no competence to render a decision. If therefore the settlement unanimously recommended by the Commission

is set aside by the two governments in favor of a different solution, or by either of them with a view to obtain a more satisfactory and binding pronouncement, such a procedure would seem to involve no violation of the treaty or of the commission's conclusions in so far as they are non-obligatory in character.

But the more interesting factor about this recommendation seems to be that it constitutes an important reflection upon the old theory of sovereign jurisdiction, that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute".²²⁵ If there is any lesson of a political nature in the conclusions of the Commission it is not a repudiation of this time-honored theory but a recognition of the fact that however absolute the sovereign jurisdiction may be, it is restricted, in practice, if not in strict theory, by the sovereign jurisdiction of other nations; in other words, by the rights and obligations of one sovereign towards another. Consequently the Commission appears to have implicitly established that works undertaken within the exclusive territorial jurisdiction of Canada, may be held liable to damages if the effect of such works is detrimental to the interests and welfare of the people and government to the south of the boundary line, and vice versa. At any rate, under Article IX the Commission is rendering a remarkable service to the United States and Canada, serving both as a commission of inquiry and as a commission of conciliation.

²²⁵ Case of the Schooner *Exchange v. McFadden and others* (1812), 7 Crauch 116; also see Hyde, *op. cit.*, vol. i, p. 84; Hall, *International Law* (Oxford, 1917), 7th ed., pp. 44-45.

CHAPTER VII

VOLUNTARY JURISDICTION

ARTICLE X of the treaty of 1909 provides for the voluntary jurisdiction of the Commission. This Article has not been called into operation so far, since the High Contracting Parties, who alone are competent to resort to the Commission under its provisions, have not presented any dispute under it. Inasmuch, however, as the Article is a part of the treaty, it may be in place to examine its provisions and their applicability, and thereby disclose what additional judicial responsibility is vested in the Commission.

Article X runs as follows:

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations or interests of the United States or the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission, by the consent of the two Parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General-in-Council. In each case so referred the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject however to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to

render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided, or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an Umpire chosen in accordance with the procedure prescribed in the fourth, fifth and sixth paragraphs of Article 45 of the Hague Convention for the Pacific Settlement of International Disputes, dated the 18th of October, 1907. Such Umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.¹

This Article is appreciably different from Article VIII, which gives the Commission compulsory jurisdiction over the boundary waters. Under Article X a reference to the Commission is not compulsory; the phrase therein used is "may be referred". Because of this lack of compulsion or mandate, the jurisdiction of the Commission under this article is designated as voluntary, a jurisdiction that can be invoked only upon the free and unfettered choice of the High Contracting Parties. If therefore any one of the Parties declares its intention of submitting any proceeding under this article to the Commission, and if the other expresses a position of non-acquiescence, the matter cannot come before the Commission. Mutual "consent" of the Parties, obtained through the properly prescribed channels, alone would empower the Commission to exercise jurisdiction under Article X.

¹ Treaty of 1909, article x. See *infra*, appendix A.

PROCEDURE UNDER ARTICLE X²

On the part of the United States the consent to the submission of a dispute to the judicial settlement of the Commission has to "be by and with the consent of the Senate".³ On the part of His Majesty's Government such a power is to be exercised "with the consent of the Governor-General-in-Council",⁴ that is, the Canadian Ministry. The usual practice of expressing consent to international arbitral proceedings is to sign an agreement, ordinarily called a *compromis d'arbitrage*,⁵ or more frequently simply a *compromis*, which is regarded as the initial legal step in arbitral procedure.⁶ The *compromis* may be in the nature of "a treaty, convention or protocol" which would define "the question at issue, and the arbitrators' powers",⁷ in this case, those of the Commissioners. The purpose of a reference to the Commission is, according to Article X, "for decision". As a rule, an arbitral tribunal is bound to decide the difference submitted to it by the parties to a controversy; it cannot deviate from this path and make a recommendation as a body of mediators can,⁸ unless the power to do so is expressly given as in the present case.

² Rule 28. See Rules of Procedure, *infra*, appendix B.

³ Article x.

⁴ *Ibid.*; see also Keith, A. B., *The Constitution, Administration and Laws of the Empire*, New York, 1924, pp. 24-27.

⁵ Potter, *Introduction to a Study of International Organization* (New York, 1922), pp. 160-161; Scott, *The Hague Conferences*, vol. i, p. 280 *et seq.*

⁶ *Ibid.*

⁷ Moore, *op. cit.*, vol. vii, sec. 1070; U. S. *Foreign Relations*, 1893, pp. 202-203; *ibid.*, 1896, pp. 232, 236.

⁸ Balch, T. W., *Arbitration as a Term of International Law* (Philadelphia, 1920), pp. 26-27, quoting Westlake, *Letter to the London Times*, Jan. 6, 1896; Moore, *op. cit.*, vol. vii, pp. 59-60; Ralston, *Law and Procedure of International Tribunals* (Stanford University, 1926), p. 43;

Under Article X "any questions or matters of difference may be referred" to the Commission; but "in each case so referred"⁹ the Commission has authority "to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference".¹⁰ This provision is essentially identical with one¹¹ in Article IX, which is strictly of an investigative character and scope.¹² The possible inference may then be that under both the articles the Commission should first act as a commission of inquiry, under Article IX not to decide but to report and recommend, while under Article X not only to pronounce on the question of right by deciding the difference but also to fulfil a certain advisory capacity by making recommendations wherever deemed appropriate or advisable. In other words, by virtue of this provision the Commission is competent *both to decide and to recommend simultaneously*.

Making recommendations while rendering decisions is not altogether a new aspect of international arbitral procedure. The point may be illustrated.

Under the treaty of peace of 1783 with Great Britain, the United States enjoyed certain privileges in common with British subjects in the fisheries off Newfoundland, Labrador

Westlake, *International Law* (Cambridge, 2nd ed., 1910-13), vol. i, p. 354; see McMaster, *History of the People of the United States* (New York, 1883-1913), vol. vi, p. 465; Richardson, *Messages and Papers of Presidents*, vol. ii, p. 547; *Br. and For. State Papers*, vol. xxii, pp. 772, 776, 783.

⁹ Westlake, *op. cit.*, vol i, p. 305; also T. W. Balch, *op. cit.*, p. 26-28.

¹⁰ Article x.

¹¹ Article ix, 2nd paragraph.

¹² See *supra*, chap. vi on Investigative Powers of the Commission.

and other parts of the North Atlantic Coast. Great Britain regarded this treaty as abrogated by the War of 1812, while the United States contended that it was only temporarily suspended during that war.¹³ This difference of opinion, however, resulted in the subsequent treaty of October 20, 1818, Article I of which defined the rights of the inhabitants of the United States to take fish in certain parts of the North Atlantic waters and to enter bays and harbors for other purposes.¹⁴ The interpretation of this article later became such a serious bone of contention between the United States and Great Britain that it was, pursuant to a convention between these countries of July 27, 1909,¹⁵ referred to a tribunal assembled at the Hague, composed of representatives of Austria, Netherlands and Argentine as neutrals, and the United States and Great Britain (Canada) as opponents. This tribunal was given "the precise question from where should be measured the 'three marine miles of any of the coasts, bays, creeks, or harbours', on or within which (according to that Article) the United States had renounced forever, any 'liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure, fish' ".¹⁶

The tribunal held that: "In case of bays, the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast."¹⁷

¹³ Dickinson, Edwin DeWitt, *The Law of Nations* (New York, 1929), p. 387.

¹⁴ For article i see 2 Stat. 248; quoted in Dickinson, *op. cit.*, p. 388.

¹⁵ Hyde, *op. cit.*, vol. i, p. 264; Malloy, *op. cit.*, vol. i, p. 835.

¹⁶ *Ibid.*

¹⁷ Jessup, Philip C., *The Law of Territorial Waters and Maritime Jurisdiction* (New York, 1927), p. 377.

Although the tribunal delivered this decision as being "correct in principle", it was nevertheless persuaded that the decision was "not entirely satisfactory as to its practical applicability".¹⁸ Consequently since the contending parties had by Article IV of the terms of reference called for a recommendation, the tribunal "recommended a different solution to the two Governments". This recommendation was based on the fact that

. . . in treaties with France, with the North German Confederation, and the German Empire, and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals. And that in the course of the negotiations between Great Britain and the United States a similar rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts; And that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule, with such exceptions, has already formed the basis of an agreement between the two powers.¹⁹

Along with this decision several other decisions²⁰ may be adduced to establish that making recommendations whilst rendering decisions is not an unusual feature of arbitral procedure and that therefore the special provision in Article

¹⁸ *Ibid.*

¹⁹ *Ibid.*; for recommendations of the tribunal see *ibid.*, pp. 377-378; for proceedings of the arbitration see Sen. Doc. no. 870, 61st Cong., 3rd Sess.

²⁰ See case of William Hardman Claim, American and British Claims Arbitration (Washington, 1926), pp. 495-498; *A. J. I. L.*, vol. vii, pp. 879-882; *ibid.*, vol. xv, p. 297; also see the Lespes Case, Moore, *Digest of Arbitrations*, p. 1302; also Home Missionary Society Claim, Am. & Br. Claims Commission (1926), pp. 421-426; David J. Adams Claim, *ibid.*, pp. 535-536.

X means that the Commission may both decide and recommend at the same time.²¹

²¹ In this connection it is of considerable interest to note what Judge Frank B. Kellogg of the Permanent Court of International Justice at the Hague observed in relation to the Order issued by that Court on December 6, 1930, in the matter of the dispute between France and Switzerland over "The Free Zones of Upper Savoy and the District of Gex" (see Publications of the Permanent Court of International Justice, series A, no. 24, Collection of Judgments (Leyden, 1930), pp. 29-43). The French Government had in Mr. Kellogg's view taken the position that "as, in agreeing upon the future regime of the zones, Switzerland might have given up any or all of her legal rights to the maintenance of the zones, the Court may, in virtue of the second clause of the sentence forming the first paragraph of Article 2 of the Special Agreement whereby the dispute was submitted to the Court disregard the legal rights of Switzerland, and if in its opinion such is necessary in order to bring the regime of the zones into line with present conditions" (p. 30). To substantiate this position the representatives of "the French Government cited the Hague Tribunal, the Behring Sea Arbitration and North Coast Fisheries Arbitration as authorities for the proposition that it is within the competence of the Court to frame an entirely new regime" (p. 33).

Judge Kellogg did not agree with this proposition. He therefore observed: "As to the authority of these precedents, it is sufficient to say that they were arbitrations pure and simple, and that the competence of an arbitral tribunal specially set up to settle a specific difference or series of differences between two or more States has as the sole limit of its jurisdiction and competence the provision of the arbitration agreement to which it owes its existence. This Court—a permanent Court of international justice—has, in its Statute, a fundamental law defining the limits of the jurisdiction it may exercise," . . . there are certain articles of the Court's Statute against which the provisions of the Special Agreement of the Parties cannot avail. Every Special Agreement submitting a case to this Court must be considered to have, as tacitly appended clauses thereto, all the pertinent articles of the Court's Statute and must, in case of doubt as to its meaning, be interpreted in the light of such provisions of the Statute of the Court" (p. 33).

To support this view Mr. Kellogg briefly referred to the origin and organization of the Court and then added: "It was desired that this Court should be permanent, and ready, at any moment, to hear and decide the legal differences of the nations. In view of the need this Court

There is perhaps another view of this provision which also appears permissible. If the Commission is called upon by the terms of the submission to render decisions on certain points or parts of a case, and conclusions or recommendations regarding others, the Commission may meet the demand under this provision. This practice also is at times followed in arbitral procedure. In the convention concluded January 24, 1903, for the settlement of the Alaskan boundary question it was provided by Article VI that: "Should there be, unfortunately, a failure by a majority of the tribunal to agree upon any of the points submitted for their decision, it shall be their duty to so report in writing to the respective governments through their respective agents. Should there be an agreement by a majority upon a part of the question submitted it shall be their duty to sign and report their decision upon the points of such agreement . . .".²²

Such a procedure would enable the respective governments to initiate appropriate proceedings thereafter, to bring the matter to a satisfactory close. Thus the recommendations of the Commission may serve, as did the recommendations of the court in the North Atlantic Fisheries case, to ease the discomfort which would follow too rigorous adherence to the strict rights of the parties.

Apart from providing for the compromis and the investment was created to fulfil, and of the circumstances surrounding its organization, it is scarcely possible that it was intended that, even with the consent of the Parties, the court should take jurisdiction of political questions, should exercise the function of drafting treaties between nations or decide questions upon grounds of political and economic expediency" (p. 34). Consequently Judge Kellog concludes: "It is my opinion, therefore, that the competence of the Court in this case extends only to the determination of the legal rights of the Parties, and that it could not, even with their consent and at their request, settle such political questions as may be involved in the execution of paragraph 2 of Article 435 of the Treaty of Versailles" (p. 43).

²² Malloy, *op. cit.*, vol. i, pp. 788, 791.

gation in a general way, Article X does not lay down any rules to be adopted by the Commission or the parties during the proceedings as regards questions of pleading, discovery of evidence, the modes of argument, or any other questions connected with procedure. The parties to the treaty of 1909 had in previous treaties of arbitration provided for the necessary rules of procedure under those treaties. The Jay Treaty of 1794,²³ for example, provided that the Mixed Commission created to determine the debts due British subjects by American citizens, should have "power to examine all such persons as shall come before them under "oath", and also to receive witnesses and evidence "according as they the Commissioners may think most consistent with equity and justice, all written depositions, or books, or papers", etc., all such "being duly authenticated either according to the legal form now respectively existing in the two countries, or in such other manner as the said Commissioners shall see cause to require or allow".²⁴ Both in the Geneva arbitration of the Alabama claims of 1872, and in the Behring Sea Fur Seal Arbitration of 1892, a purely judicial procedure was followed.²⁵ But Article X of the treaty of 1909 is silent on this question. To a certain extent this defect is remedied by the Rules of Procedure which the Commission adopted after its organization.²⁶

This lack of direct provision, however, does not appear to be a handicap, because it seems that as far as such procedural requirements are concerned, the Commission and the Parties may be governed by Article XII and the rules of procedure enacted by the Commission in pursuance thereto. In that

²³ Malloy, *op. cit.*, vol. i, pp. 594-595, article vi.

²⁴ *Ibid.*, p. 595.

²⁵ Politis, *La Justice Internationale* (Paris, 1924), pp. 49, 54; also see Bishop, *International Arbitral Procedure* (Baltimore, 1930), p. 2.

²⁶ See Rule 28, Rules of Procedure, *infra*, appendix B.

case the apparent deficiency is made up; Article XII says that: "The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person through agents or employees as may be deemed advisable."²⁷ It also gives the Commission power to administer oaths to witnesses, and to take evidence on oath.²⁸ Thus it appears, as far as procedure is concerned, that Article X should be interpreted in the light of Article XII and the Rules of Procedure. Otherwise the difficulty may be met with by providing for such a procedure in the compromis.

DECISIONS UNDER ARTICLE X

The second section of Article X provides that: "A majority of the said Commission shall have power to render a decision".²⁹ Under Article VIII also there is, as already noted, a similar provision.³⁰ Nevertheless the procedure in case of an evenly divided opinion is different; according to Article VIII the Commissioners are called upon, in the event of a tie decision, to submit "separate reports" to their respective governments, who subsequently "shall . . . endeavor to agree upon an adjustment of the question".³¹ Under Article X the Commissioners have the alternative of submitting either "joint reports" or "separate reports" to the governments. But the governments, as in the previous case, have not undertaken to endeavor to solve the difference between themselves; they have, however, pledged that in case an evenly divided decision is handed down by the Commission under

²⁷ Article xii.

²⁸ *Ibid.*

²⁹ Article x, 2nd part.

³⁰ See *infra*, p. 365.

³¹ Article viii.

Article X, the matter "shall" thereafter be referred to the "final decision" of an "Umpire".³²

According to the rule under Article X reference of any dispute in the first instance to the Commission is voluntary. Both parties have complete freedom either to consent or not to consent to a submission of the dispute.³³ This stage may be regarded as voluntary arbitration. But when once the dispute is referred, and the Commission is evenly divided so that there is no decision, the subsequent reference to an umpire chosen in conformity with certain prescribed rules,³⁴ is no longer a voluntary matter; it is compulsory. In the former case the phrase used is "may be referred"; in the latter, "shall . . . be referred". This latter reference may therefore be considered as compulsory arbitration. The umpire, however, is not to make an entire review of the case; he is competent only to decide "those matters and questions so referred on which the Commission failed to agree".³⁵

FINALITY OF DECISIONS UNDER ARTICLE X

Where, however, a decision is rendered by the Commission, it may be regarded as final,³⁶ or in arbitral parlance as an "award". The Commission, nevertheless, should see that in decreeing its award it does not exceed its own powers under the terms of the submission. As Umpire Plumley said in one of the Venezulean Arbitration cases, "an arbitral tribunal is one of great power within the terms of its creation, but absolutely powerless outside thereof. Nothing can be

³² Article x.

³³ *Ibid.*

³⁴ Scott, *op. cit.*, vol. i, p. 283; see Rules 4, 5 and 6 of Article 45 of the Hague Convention, 1907.

³⁵ Article x.

³⁶ Hyde, *op. cit.* vol. ii, p. 157.

within its terms except such as is there by the clear and express agreement of the High Contracting Parties".³⁷

Article X does not make any provision for the revision of an award, as is provided for by the Hague Conventions in 1899 and 1907, wherein the parties may reserve in the compromis their "right to demand the revision of the award". "It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award, and which was unknown to the tribunal and to the party which demanded the revision at the time the discussion was closed".³⁸ But in the case of the Commission it seems under Article X of the treaty of 1909 that a provision for revision may be incorporated in the compromis³⁹ by which

³⁷ Stevenson Case, *Venezuelan Arbitration*, 1903, pp. 438, 455; also see Ralston, *op. cit.*, pp. 43-44, sec. 52.

³⁸ Article 55 of 1899, article 83 of 1907; Higgins, Pearce, *The Hague Peace Conferences*... (Cambridge, 1909), p. 153; also see F. W. Holls, *The Peace Conference at the Hague*, New York, 1900, p. 286; Scott, *op. cit.*, p. 301; Foster, *Arbitration and the Hague Court* (Boston, 1904), *passim*.

³⁹ On the question of *res judicata* as applicable to arbitral awards, Judge Ralston says, "...no author believes that the awards of arbitrators may be attacked because of erroneous appreciation either of the facts or of the law as applicable to them... Upon this point Bluntschli argues that a decision may not be attacked on the pretext that it is erroneous or contrary to equity save for errors of calculation. Heffter finds that errors which may be alleged against the sentence, when they are not the result of a partial spirit, do not constitute a cause of nullity. Kamarowsky quotes Chrabro-Vassilewsky as contending that the effect of an arbitral sentence cannot be lost on account of reasons affecting its substance. Vattel declares that the parties may not say 'it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators'. Calvo is of the opinion that the decision of the arbitrators cannot be attacked on the pretext that it is erroneous or contrary to equity or prejudicial to the interests of one of the parties". Ralston, *op. cit.*, p. 59; cf. American Agent's Report (Ralston's), pp. 222-228, on Pious Fund Arbitration by the Hague Permanent Court of Arbitration; Hyde, *op. cit.*, vol. ii, section 581, p. 157.

the matter is referred to an umpire. The Article itself is silent on the matter.

DOUBTFUL JURISDICTION UNDER ARTICLE X

Article X does not provide that the Commission may pass upon its own jurisdiction in case it is in doubt. If there is a compromis, the terms of which are clear and explicit, there is no occasion for such a doubt, but it may happen that "however carefully drawn, the Compromis may be ambiguous and thus require interpretation".⁴⁰ "It is a familiar doctrine", says Dr. James Brown Scott, "that the tribunal should be competent to interpret the Compromis; otherwise the proceedings would be delayed, if not stopped."⁴¹ In the Rio Grande Claim before the American and British Claims Tribunal, the court held that

whatever be the proper construction of the instruments controlling the Tribunal or of the Rules of Procedure, there is inherent in this and every legal tribunal a power, and indeed a duty, to entertain, and, in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. The principle has been laid down and approved as applicable to international arbitral tribunal.⁴²

Although thus the right to pass upon its own jurisdiction

⁴⁰ Scott, *op. cit.*, vol. i, p. 298.

⁴¹ *Ibid.*; Moore, *Digest of Arbitrations*, vol. i, pp. 324-328; DeLapradelle et Politis, *Recueil des Arbitrages Internationaux*, vol. i, pp. 99-105.

⁴² *A. J. of I. L.*, vol. 19, p. 211; *American State Papers, Foreign Relations*, vol. ii, p. 398; Ralston, *op. cit.*, p. 46.

In another case, Lord Chancellor Loughborough's opinion was "that the doubt respecting the authority of the Commissioners" created under Article VII of the Jay Treaty, "to settle their own jurisdiction was absurd; and that they must necessarily decide upon cases being within, or without, their competency". Ralston, *op. cit.*, p. 44; Scott, *op. cit.*, p. 298.

seems to rest with an international tribunal,⁴³ it cannot be predicted with any degree of precision whether the International Joint Commission whilst acting under Article X would adopt, or would be competent to adopt, a similar procedure, because as has been already pointed out, under Article X the Commission has not been called upon to settle any dispute to date. It may be said however that in spite of the fact that the treaty of 1909 has not expressly provided for such power for the Commission regarding its compulsory jurisdiction pertaining to the uses, obstructions or diversions of the boundary waters under Articles III, IV and VIII, it has still under those articles passed upon questions of jurisdiction whenever that jurisdiction has been contested.⁴⁴ This fact as well as the ordinary procedure in international arbitrations, makes it probable that the Commission will pass upon its own competence under Article X if ever in any case it may be challenged.

THE SCOPE OF ARTICLE X AS AN ARBITRAL CLAUSE

In view of the language of Article X, the question may be raised what classes of disputes may be submitted to the decision of the Commission as an arbitral court. Article X declares that *any questions* or matters of difference arising between the High Contracting Parties involving the rights, obligations or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, may be referred for decision ”⁴⁵ to the Commission. This phraseology seems to be capable of two constructions in the light: (a) of the Preamble of the treaty

⁴³ See Article 36 of the Statutes of the Permanent Court of International Justice, Hudson, *The Permanent Court of International Justice* (Cambridge, 1925), p. 346.

⁴⁴ See case of the Rainy River Improvement Co., Docket no. i.

⁴⁵ Article x, 1st part.

of 1909, or (b) of the language and tenor of the Article itself. But it should clearly be pointed out that there is nothing to check the action of the two governments if they both decide to refer any case, irrespective of its nature and gravity, to the Commission under Article X.

I. In the light of the Preamble

If the Preamble, is as a rule, declaratory of the end and aim of the treaty, the phrase "any questions or matters of difference" as used in Article X can involve only a limited category of cases. The Preamble declares the purpose of the treaty to be threefold:

1. To prevent disputes regarding the use of *boundary waters*.
2. To settle all questions which are now pending between the the United States and the Dominion of Canada, involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other along their *common frontier*.
3. To make provision for the adjustment and settlement of *all such questions* as may hereafter arise.⁴⁶

Consequently if all the provisions in the treaty should be construed in view of this Preamble, the scope of Article X would appear limited. "There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulations is to be taken together, and that all articles *in pari materia* should be considered aspects of the same stipulations."⁴⁷ Applying this well-settled rule of con-

⁴⁶ Preamble.

⁴⁷ Mr. Livingstone, Secretary of State, to Baron Lederer, consul-general of Austria, Nov. 5, 1932, quoted in Moore, *op. cit.*, vol. v., p. 249 regarding treaty between the United States and Austria-Hungary; see *St. M. and M. Hearings*, 1917, p. 11, quoting Cooley from *A Treatise on Constitutional Limitation* (7th ed.), p. 91.

struction it would appear that Article X may have to be construed in the light of the provisions of the treaty as a whole, rather than in a detached manner with a view to giving a meaning or purpose which it may not possess.⁴⁸

A. *Article X supplements the other Articles*: If therefore the Article is construed in the light of the preamble it would seem that it serves to supplement Articles VIII and IX for the following reasons:

In the event of an even decision under Article VIII, the duty of the two sections of the Commission under that Article is to furnish "separate reports" to the governments on each side. If the governments reach an agreement, the matter may be settled. But if they do not, they have not provided in Article VIII for the measures they or the Commission would have recourse to in order to end the dispute amicably. In brief, there is a fissure in Article VIII, and Article X may well fill it. The two governments may refer the matter to the Commission as an arbitral body for a decision. No doubt there may be a certain degree of pessimism in this procedure: if the Commission was evenly divided under Article VIII, there is scant hope that the same body might act differently under Article X. Nevertheless, considerable changes may be worked out by the two governments while the case is in their hands subsequent to the Commission's evenly divided decision, and meanwhile through diplomatic negotiations they may be working towards a *compromis d'arbitrage*. Otherwise there may not be a different result in the latter stage.

It may be urged, however, that not only Article X, but the provisions of Article IX, which is of an investigative char-

⁴⁸ See Hearings, St. Mary and Milk River apportionment case under Article vi of the treaty of 1909, p. 262, where Mr. W. B. Sands, counsel for the Water Users of the Milk River Valley in Montana submitted that he firmly believed that: "The provisions of this treaty are thoroughly and fixedly limited by that preamble", also p. 278.

acter, may be available to the governments to meet the exigency resulting from their inability to agree upon a settlement of the dispute left evenly decided by the Commission. This possibility cannot be denied, but it should be remembered that the report or recommendation which alone the Commission is competent to make under Article IX, does not possess the legal efficacy or binding character of a decision which can come, after exhausting the remedies of Article VIII, only from Article X. Consequently Article X would appeal to be a supplement in a judicial way to Articles III and IV through Article VIII.

This position does not mean, however, that Article X may not contribute to Article IX. It may. If in a case under that Article the Commission as an investigative body has come to an evenly-divided report and recommendation, the two governments can still make the question of difference one of reference to the Commission under Article X for a decision. Even here the same difficulty as well as the same remedy may possibly be employed, because the conclusion of a protocol or compromise would help the governments to create new circumstances on which the Commission may render a decision either by a majority or unanimously.

B. *Subsequent Conduct of the Contracting Parties*: The above position that Article X is a supplement to the other provisions of the treaty of 1909, because governed by the Preamble thereof, would seem to be further supported by the conduct of the parties subsequent to the conclusion of the treaty. At the time of the negotiations and the signing of that treaty there was already another treaty in force. The first Article of this latter treaty, ratified on June 4, 1908, by Great Britain and the United States, declares that

differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two Contracting Parties and which it may not have been possible to settle by

diplomacy, shall be referred to the Permanent Court of Arbitration established at the Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States and do not concern the interests of third Parties.⁴⁹

By Article II of the same convention it was provided that in each case before appealing to the Permanent Court of Arbitration the parties were to "conclude a special agreement"⁵⁰ regarding the nature of the dispute, the powers of the arbitrators and the mode of procedure. Such an agreement or compromise "shall be binding only when confirmed by the two Governments by an Exchange of Notes". This convention was concluded for a period of five years from the day of the exchange of its ratifications.⁵¹ But it has been renewed *three times* since the original date of its expiry. In other words, at the time of the conclusion of the treaty of 1909 and therefore Article X, the treaty of 1908 for the general arbitration had already covered Canada in its status as a British Dominion for purposes of arbitrating differences. But the need for a special agreement for providing for the settlement of boundary questions between the United States and Canada had not been exhausted; hence the treaty of 1909, with its four-fold method of adjusting boundary disputes, one of which was the voluntary jurisdiction conferred on the Commission under Article X. The apparent inference then would seem to be that Article X was intended to

⁴⁹ *Treaties and Conventions affecting Canada in force between His Majesty and the United States, 1814-1925* (Ottawa, 1929), pp. 297-298.

⁵⁰ *Ibid.*, p. 298.

⁵¹ Ratified June 4, 1908, renewed May 31, 1913, June 3, 1918, and June 23, 1923; see *ibid.*, pp. 508-509, regarding the possibility of reference to the Permanent Court of International Justice at the Hague, also *ibid.*, pp. 297, 298, 459, 507.

refer to boundary questions; this position would appear to be especially strong in view of the fact that since the conclusion of the treaty of 1909 several cases have occurred which have not been submitted to the Joint Commission. The recent case of the *I'm Alone* is one in point, it having been referred to a special arbitral commission in accordance with the terms of the Liquor Smuggling treaty between the United States and Great Britain.⁵² So also several cases involving the United States and Canada, have been arbitrated by the American and British Claims Commission established by special convention between the United States and Great Britain, dated August 18, 1910.⁵³ These instances may serve to indicate the restricted scope of Article X.

Finally, Article X of the treaty appears to be limited to the boundary because, if it were one of general application, it should have expressed its relation to existing treaties, since otherwise it would savor of a certain redundancy. It is interesting to note in this connection that in both the treaties of 1908 and 1909 the plenipotentiaries who affixed their signatures on behalf of their respective countries were the same persons: the signatures of the late Lord Bryce and the Honorable Mr. Elihu Root appear in both the documents. If, therefore, there had been any redundancy, it scarcely could have escaped their observation. The inference may then be that Article X is not one of a general scope, but is a supplement or auxiliary to the method of settling boundary disputes for the avoidance of which the treaty of 1909 was itself concluded.

⁵² See Department of State Press Release, March 7, 1931, Publication No. 167, page 156; *A. J. I. L.*, vol. 28, April, 1929, pp. 351-362.

⁵³ American and British Claims Commission, Report of Fred K. Nielson, under special agreement of August 18, 1910.

III. In the light of the language of Article X

Notwithstanding all the limitations pointed out above, there seems to be another side to the scope of Article X. Both the Preamble of the treaty as well as Article IX thereof, contain the phrase "along the common frontier", qualifying "questions or matters of difference". This phrase does not occur in Article X; the phrase "any questions or matters of difference as used is not qualified by any restrictive phrase. In the preamble the phrase "along the common frontier" intervenes immediately after the phrase "inhabitants of the other". In Article IX also the same phrase occurs in the same form; but in Article X the phrase does not occur at all. Was this omission unpremeditated on the part of the Contracting Parties? If it were not, the scope of Article X could be general and not confined to "the common frontier".

Secondly, Article X appears to be clear in itself, and in consequence that Article may take an independent existence as a general arbitral provision; because "the clear language of an act cannot be cut down by a reference to the Preamble",⁵⁴ and while a preamble "may explain what is of doubtful meaning", it certainly "will not limit what is clear".⁵⁵ Applying this legal principle, it may be held that in view of the clarity of Article X there appears no need to refer to or to restrict it by the terms of the Preamble.

Finally, if it be contended that the Contracting Parties have not exploited the resources of Article X, it is submitted that a mere lack of utilization on the part of the parties may

⁵⁴ Hearings, *St. M. and M. River*, 1917, p. 11, citing 29 Chancery Divisions 950; see opinion of Justice Hay, in *Jones v. Walker*: "A preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in the case of two constructions, to adopt the one most consonant to their intention and design"; 2 Paine's Civil Cases 705.

⁵⁵ Bouvier, *Law Dictionary*, p. 963, and cases cited.

not nullify the scope of the article itself. As long as the treaty of 1909 remains in force, without any qualifications governing the applicability of Article X, so long the general arbitral scope of that article would remain unimpaired as at present; therefore the Contracting Parties are free either to appropriate or not to appropriate to themselves the fullness of the possibilities which they themselves have provided in that article.

At any rate, in Article X the Contracting Parties have provided an international tribunal by which any dispute, either of a general character, or arising only "along the common frontier" and "which concern themselves" and their citizens and subjects on the two sides of the boundary, "may be settled by their own representatives".⁵⁶ "in accordance with the principles of law and justice".⁵⁷ The fact that the Article may be resorted to at any time and that the personnel is always available for service, gives the Commission a permanent arbitral character rather than that of one appointed *ad hoc* to settle international differences.

⁵⁶ *A. J. I. L.*, 1910, vol. 4, p. 673.

⁵⁷ *Ibid.*, 1912, vol. 6, p. 193; see also Appleton, *Historic Record of the Triumph of Arbitration from 1789-1899* (London, 1899), *passim*.

CHAPTER VIII

PROCEDURE

DURING the hearings in the case presented to the Commission by the Greater Winnipeg Water District, Commissioner Tawney said that

in preparing the rules of procedure we [i. e. the Commissioners] have endeavored to follow the procedure of the courts, as nearly as possible, on both sides of the line, with such latitude as necessary to meet the convenience of parties having business before the commission . . . we should proceed as nearly as possible in accordance with the established rules of practice in judicial tribunals, both in the United States and Canada.¹

These rules of procedure were adopted by the Commission on February 2, 1912, scarcely a month after its organization at Washington, D. C.²

Before turning, however, to an examination of the procedure in detail, certain points of outstanding difference may be noted from the viewpoint of ordinary legal procedure. The first refers to the mode of access provided for the parties seeking the Commission's approval in any necessary cases. As is the case with most international tribunals, the applicant does not and cannot gain direct access to the Commission; under all circumstances his application should first be submitted to, and thereafter forwarded by, the respective government within whose territorial jurisdiction a use of the boundary waters is contemplated. If the govern-

¹ *Hearings*, Greater Winnipeg Water District, p. 11.

² *Congressional Record*, vol. 49, part 4, 1913, 62nd Cong., 3rd Sess., p. 3123.

ment concerned objects to the subject matter of the application, it may then prevent its being considered by the Commission by not forwarding it to that agency. In that case the applicant has no means of reaching the Commission. Where in one project two separate constructions are required on the two sides of the boundary, corresponding to each other in location and purpose, two separate applications should reach the Commission from the two governments on the two sides of the line, as in the joint cases of the Michigan Northern Power Company and the Algoma Steel Corporation, Ltd., the Rainy River Improvement Company and the Ontario and Minnesota Power Company, the St. Croix River Power Company and the Sprague's Falls Manufacturing Company, Ltd. The requirement that the governments should forward the application appears to be interesting in that each government would seem to have an opportunity to study the application from the standpoint of its own national interests in the light of the international questions that may be involved.

Another difference to be noted is that the terms "plaintiff" and "defendant", such old acquaintances in ordinary legal procedure, are not used in any of the cases before the Commission. This absence of terminology, however, should not create the impression that every application goes unargued. In every case there is an applicant, public or private, and there are opponents, public or private, as the case may be.

All parties involved or interested are notified by the two secretaries of the Commission on their respective sides, and they are to be represented before the Commission by counsel who have the right to examine witnesses, file briefs, and make oral arguments. There are certain rules of evidence which are later discussed. It does not seem quite clear whether decisions are handed down in open sessions or are

delivered to the parties through their respective governments to whom the Commission may report. The rules do not specify the procedure in this respect. The Commission holds no regular sessions as a joint body; nevertheless applications may be directed to it at any time through either of the national sections and subsequently the Commission may hold special sessions. As a rule, the Commission is to meet jointly only twice a year, once at Washington and once at Ottawa, but if the work of the Commission done to date is considered, it would appear that it is in joint session more frequently than twice a year. One of the outstanding characteristics of the proceedings before the Commission is the highly important role played by scientific and technical experts. With these general remarks a detailed examination of certain rules may here be made.³

The first rule defines certain terms as used in the rules as a whole; unless the context otherwise requires, "words importing the singular number shall include the plural",⁴ and vice versa. The word "party" or "parties" shall include Governments and also persons; the word 'person' shall include individual, partnership or corporation and 'oath' shall include affirmation".⁵

After these definitions the Commission enunciated the modes of access to it by parties seeking its approval. In all cases "to be submitted to the Commission under Articles III, IV and VIII of the Treaty [1909]"⁶ the following procedure would have to be observed:

a. *By the Governments*: that is, by the High Contracting Parties to the treaty.

³ See *infra*, appendix B.

⁴ Rule no. 1.

⁵ *Ibid.*

⁶ Rule no. 6, 1st part.

Where one or the other of the Governments on its own initiative seeks the approval of the Commission for the use, obstruction or diversion of the waters with respect to which under Articles III and IV of the Treaty the approval of the Commission is required, it shall file with the Commission an application setting forth as fully as may be necessary for the information of the Commission the facts upon which the application is based, and the nature of the order of approval desired.⁷

Under this rule, so far, there has been but one case; and that was filed by the Government of the United States on December 29, 1916, for the approval of plans for undertaking certain improvements in the channel of the St. Clair River on the American side. The approval was granted by the Commission on May 18, 1917.⁸

Section b of Rule 6 declares that

Where any private person seeks the approval of the Commission for the use, obstruction or diversion of such waters, he shall first make written application to the Government within whose jurisdiction the privilege desired is to be exercised, to grant such privilege, and upon such Government, or the proper department thereof, transmitting such application to the Commission, with the request that it take appropriate action thereon, the same shall be filed and proceeded with by the Commission in the same manner as an application on behalf of one or the other of the Governments. All applications by private persons should conform, as to their contents, to the requirements of subdivision (a) of this rule.⁹

In other words, the governments of the high contracting parties may directly approach the Commission, while any other agency whether it be state or provincial, or private persons, may do so only through one or the other of the

⁷ *Ibid.*

⁸ Docket xiii.

⁹ Rule 6b, *cf.* Rule 6a.

governments of the contracting parties. Although there exists this difference in the modes of access, there appears no difference as regards the rest of the procedure to be adopted by the two classes of parties, i. e. public and private. In all cases, therefore, "One duplicate original and 25 copies of the application shall be filed with each of the secretaries, and there shall be filed with each of the secretaries such drawings, profiles and plans of survey on tracing linen, and such specifications and maps as may be necessary to illustrate clearly the matter of the application."¹⁰ "In cases where either of the respective Governments shall have authorized the use, obstruction or diversion of navigable waters, all plans filed as aforesaid shall be accompanied with the approval thereof by the Government or proper department of the Government within whose jurisdiction such waters lie."¹¹

b. *By Provinces and States*: The first provincial agency that had to conform to these rules was the Greater Winnipeg Water District, a Canadian corporation, "created by an act of the legislative assembly of the Province of Manitoba",¹² for diverting the waters of Shoal Lake and of the Lake of the Woods "for domestic and sanitary purposes by the inhabitants of the Greater Winnipeg Water District".¹³ The application had been first filed with the Min-

¹⁰ Rule 7.

¹¹ Rule 8. By an Act of Congress of July 13, 1892, section 3, 27 Stat. 88, amending section 7 of the Act of Sept. 19, 1890, the erection of any structure in any navigable waters, in such a manner as would impede navigation, was declared unlawful without the permission of the Secretary of War. See Moore, *op. cit.*, vol. i, pp. 621-623; also see *U. S. v. Rio Grande Dam and Irrigation Co.* (1899), 174 U. S. 690. In Canada, the Minister of Public Works seems to possess the power of approval of any constructions in navigable waters. See case of the Greater Winnipeg Water District, Order, p. 15.

¹² Chap. 22, Statutes of Manitoba, 3 George V, 1913; Opinion, p. 3.

¹³ *Ibid.*; also Hearings, p. 7; Opinion, p. 3.

ister of Public Works of Canada with a request that the latter "transmit this application" to the Commission, under rules 6, 7 and 8 of the said commission, accompanied with a request [of the Minister] that the commission take appropriate action thereon". For such purposes the petitioners forwarded the following documents:¹⁴ "(a) One duplicate original of this application for each of the secretaries of said Commission. (b) One original tracing map (for each of said secretaries). . . . (c) Twenty-five white prints of said map for each secretary (50 in all)." ¹⁵ The Minister of Public Works approved the application and map and forwarded them to the Commission with the request that the Commission "take appropriate action thereon".¹⁶

The second agency that had to observe the rules 6b, 7 and 8 of the Procedure of the Commission, was the Commissioner for Inland Fisheries and Game for the State of Maine, who requested that authority be granted "to all dam owners" on the St. Croix River "to erect such fishways as may be approved by said Commissioner for Maine and the legal representative of the Canadian Government".¹⁷ This application had been sent to the State Department of the United States, and had been transmitted to the Commission by the Acting Secretary,¹⁸ "for appropriate action", along with fifty copies of it signed by the Commissioner for Fisheries.¹⁹ The application was filed on June 19, 1923.²⁰

The third and the last agency that has sought the approval of the Commission was on the Canadian side of the boun-

¹⁴ Order, p. 15.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, signed R. Rogers, Minister of Public Works.

¹⁷ Application, *St. Croix River Fishways, Hearings*, p. 8.

¹⁸ Mr. William Phillips, *Hearings*, p. 9.

¹⁹ *Ibid.*

²⁰ Docket xviii.

dary. This time the New Brunswick Electric Power Commission, "appointed by the Lieutenant-Governor-in-Council of the Province of New Brunswick",²¹ prayed for authority to proceed with the construction of a dam at Grand Falls in New Brunswick. The application had been forwarded to the Minister of the Interior, Canada, on January 15, 1925, and on February 21st the Acting Minister²² transmitted it to the Commission. In his letter of transmittal the Acting Secretary says: "Application on behalf of the New Brunswick Electric Power Commission to the Government of Canada . . . has been made and approval authorized."²³ "In accordance with the rules of procedure of the International Joint Commission, there are transmitted herewith one duplicate original and fifty copies of the application, with two complete sets of accompanying plans on tracing linen."²⁴ In other words, in all these cases the applicants, in spite of their status as governmental agencies, whether state or provincial, have adopted the procedure prescribed for "private persons".

c. *By Private Parties*:²⁵ Some applications in this connection involved certain difficulties in matters of procedure. When the case of the Rainy River Improvement Company came up for hearings, Commissioner Tawney remarked:

I take this occasion to call attention to the fact that this application is referred to the American section of the commission by the Acting Secretary of State instead of being referred to the commission. . . . The fact that it is not referred to the

²¹ Acts of Assembly (New Brunswick), chap. 53, 1920; also Hearings, p. 6.

²² Mr. Charles Murphy.

²³ Hearings, *N. B. E. P. Com.*, p. 5.

²⁴ *Ibid.*

²⁵ See Rule 1 on definition.

commission but to one section of the commission might be waived. The commission might notify the State Department, however, that the American section, as such, has no jurisdiction over anything except the administration of its own affairs and that applications in the future should be referred to the commission instead of to one section of the commission.²⁶

To this Commissioner Turner added that the application "is addressed to us and transmitted to us by the State Department without any request that we take any action whatever on it. . . . I think we should inform the State Department that we cannot act upon anything addressed to the American section."²⁷

Another difficulty in procedure that arose in this case was whether or not the applicant should first obtain the approval of the respective governments before he resorts to the Commission for its approval. Counsel opposing the project in this case held that inasmuch as the approval of the government of Canada had not been obtained by the applicant on the Canadian side, the Commission could not entertain jurisdiction. This seems to have been the position of Mr. R. J. Powell,²⁸ a colleague of Mr. Watson, who was appearing on behalf of the Rainy River Lumber Company. "I say", declared Mr. Watson to the Commission, "you have no jurisdiction *at the present time*. Assuming that the Government of Canada does give its approval, my offhand reading of the matter would lead me to the view that *then* this commission still has the power to deal with the matter."²⁹ Counsel Thompson, appearing on behalf of the Government of Canada, however, differed from this view. He submitted that his "impression of the reading of the

²⁶ Hearings, *R. R. I. Co.*, p. 13.

²⁷ *Ibid.*, p. 14.

²⁸ *Ibid.*, pp. 87-91.

²⁹ *Ibid.*, p. 40.

treaty is, that this [the need of obtaining governmental approval first] is not a condition which from the words of the treaty would cause the application to be rejected by this commission on the ground that the applicant had not first secured approval of the Government.”³⁰ The Commission, however, did not pass upon the issue, since it dismissed the application for want of jurisdiction on the ground that there would eventually be a special agreement in the form of certain reciprocal legislation which the parties had to get enacted.³¹

In the opinion regarding “the application of the Michigan Northern Power Company for the proposed lease with the United States and of the diversion of water, construction of compensating works and plans therefor, and all acts authorized in said lease”,³² Commissioner Turner (U. S.) held:

It does not appear from the application in this case, nor from the accompanying papers, that the Secretary of War has ever given his approval to the plans and specifications accompanying the application. . . . On this state of facts the applicant through its attorney³³ . . . has asked the Commission to consider *in limine* and determine, whether the approval of the Secretary of War to its plans is essential to action by the Commission.³⁴ . . . The view which actuated the Commission in the adoption of the rule (i. e. Rule 8)³⁵ requiring all plans filed with applications for the use, obstruction, or diversion of navigable waters to be accompanied with the approval of the

³⁰ *Ibid.*, p. 97.

³¹ The case is dealt with elsewhere.

³² Opinion, *M. N. P. Co.*, p. 3; this opinion was rendered at the request of the Michigan Northern Power Co., and the Algoma Steel Co., Ltd.

³³ Mr. Clarence M. Brown.

³⁴ Opinion, *ibid.*, p. 4.

³⁵ *Ibid.*, p. 6.

Government or the proper department of the Government within whose jurisdiction such waters lie, was that the Commission had exhausted its functions under Articles III and VIII of the treaty when it had approved either with or without conditions, or had disapproved, the specific project submitted to it, and that the treaty did not contemplate that it should take up and consider with every applicant who might invoke its jurisdiction, speculative and problematical plans for uses . . . of boundary waters, which might never have the necessary authority of the Government within whose jurisdiction the waters happen to lie.³⁶ . . . The Commission is not a supervising agency to formulate with applicants plans to be submitted to the respective Governments for approval.³⁷

Nevertheless the Commission

does not wish to be understood as holding the approval of plans by the proper department of the respective Governments is vital to its jurisdiction to proceed to the consideration of application made under Articles III and VIII of the treaty. It holds only that they are vital to its capacity to proceed intelligently and effectively; that in contemplation of that fact it made a rule pursuant to power conferred on it by treaty, requiring applicants to obtain such approval, and that in its judgment it ought not to proceed to hear and determine these applications in advance of evidence presented to it of compliance with the said rule.³⁸

Although the Commission held this view in the case, it cannot be said that it was adopted on subsequent occasions when similar questions came before it. In the cases of the St. Croix Water Power Company and the Sprague's Falls Manufacturing Company the same issue had to be decided. Counsel MacInnes for the Dominion government took the position that "this application is at present incomplete,"

³⁶ *Ibid.*, p. 7.

³⁷ *Ibid.*

³⁸ Rule 8; Opinion, *ibid.*, p. 11.

and that until the applicant had obtained the authority of the Canadian government, "it will be impossible for this Commission to give its decision".³⁹ To this Commissioner Glenn (U. S.) said that, "I understood we would take action before Congress and before the Canadian Parliament did; that is to say, that we would make our recommendation to them".⁴⁰ The Counsel did not agree with this view. He recalled the previous occasion when Senator Turner as a member of the Commission "took a very definite view that the Commission would not make orders which might prove futile". Commissioner Powell thought that Senator Turner's view "was a matter of policy".⁴¹ Commissioner Tawney pointed out the difference between the case in which Mr. Turner took the above view and the one then before the Commission. "The rule you refer to, Mr. MacInnes", said he,

on which the decision of the commission was rendered, relates to cases where authority has previously been obtained. In such cases the commission will not proceed unless the plans for the construction of the work have been approved by the Government authorizing the work to be done. It does not apply, however, to a case where no authority has yet been given. In such a case the commission has reached no decision as to whether it will or will not proceed to render a conditional order, which order would become effective upon the applicant pending the authority such as he must have from the Government within whose jurisdiction the structure or obstruction is made.⁴²

Mr. MacInnes indeed differed from Commissioner Tawney's explanation. He read Article III and pointed out that according to its provisions "no further or other uses . . .

³⁹ *Hearings, St. Croix W. P. Co.*, p. 50.

⁴⁰ *Ibid.*, p. 51.

⁴¹ *Ibid.*

⁴² *Ibid.*

shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval . . . of . . . the International Joint Commission.”⁴³ “The treaty as worded there shows there must be authority of the respective Governments, to be followed by the approval of this Joint Commission.”⁴⁴ To this Commissioner Powell and Tawney replied that it “does not necessarily follow”.⁴⁵ Further, in the course of the same proceedings, Commissioner Tawney said:

As a matter of fact, under the treaty, it is not material whether the applicant applies to this commission [for approval] of that which he proposes to do or has done before obtaining authority from the Government within whose jurisdiction the obstruction is erected under the treaty.⁴⁶ . . . The application comes to the commission through one or both of the Governments. It does not come to the commission through the individual alone. You must apply, first, to the Government and the Government refers the application to the commission for its consideration under the treaty.⁴⁷

Thus the question was lengthily argued, whether governmental approval should precede the application to and approval by the Commission. There was no doubt expressed on any side as regards the necessity of obtaining both the approval of the government concerned as well as that of the Commission. But the Commission held in its opinion that “neither of these requirements is by the treaty required to be satisfied previously to the other”.⁴⁸ In other words, any private application should be transmitted to the Commission

⁴³ Article iii.

⁴⁴ Hearings, *ibid.*, p. 51.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p. 101.

⁴⁷ *Ibid.*

⁴⁸ Opinion, *St. Croix W. P. Co.*, p. 9.

by the respective governments or their appropriate departments with or without specific approval of the plans and specifications attached thereto; and then the Commission may take its own action and issue an order of approval or disapproval. If the order is one of approval, and the applicant has not procured the authority of the government concerned or its department, it cannot be effective;⁴⁹ the approval of the Commission is independent of the government's action, and therefore it does not preclude or prejudice the action of the government subsequent to that of the Commission.^{49a}

Another factor about applications is that each of them should seek the approval of a project complete in itself, and not alone of a part of that project as long as it concerns the international boundary. This issue was brought out in the case of the St. Lawrence River Power Company. Here the company had contemplated a three-fold project in the South Channel of the St. Lawrence River:⁵⁰ the construction of an ice boom, the digging of the channel, and the building of a submerged weir⁵¹ near Massena, N. Y. The company, therefore, sought the approval of the U. S. War Department first, and the War Department, doubting whether it could authorize the applicant to proceed with all the three parts of the project, chiefly the weir, without the approval of the Commission, separated the subject matter of the application⁵² and instructed the applicant to submit the question of the weir to the Commission and get its approval also.

Before the application came up for hearings by the Com-

⁴⁹ Hearings, *ibid.*, p. 101.

^{49a} Cf. the cases involving questions of title discussed, *supra*, p. 160.

⁵⁰ See the case on p. 190, *supra*.

⁵¹ Hearings, *St. L. R. P. Co.*, 1918, p. 5.

⁵² *Ibid.*, p. 10.

mission, part of the work had already been completed. Commissioner Tawney therefore asked Judge Koonce, representing the U. S. State Department, "Do I understand you to say that a part of this work has already been done?" "Yes", replied the counsel. "That channel has been dredged and the boom is ready to be constructed, as I understand it." Then Counsel Keefer, representing the Dominion Government, put a question to Counsel Koonce: "Do I understand you to say that that part of the work does not require the approval of either Canada or the International Joint Commission?"⁵³ "That is correct", answered Mr. Koonce. "This submerged weir, while we do not think it is going to affect the levels of waters on the Canadian side or injuriously affect Canadian interests in any way, yet out of respect for the Commission and out of respect for treaty obligations we concluded it was our duty to resolve the doubt in favour of submitting it to you. That is the reason we put that condition in there that it should be subject to your approval."⁵⁴ Commissioner Powell wanted to know why Mr. Koonce did "not take this matter up with the Canadian Government and agree on it? You came here without notifying the Canadian Government."⁵⁵ To this Counsel Koonce replied, "I can answer that, Mr. Powell. . . . Inasmuch as these constructions are entirely within American territory, and have been authorized by the Government, the American Government being directly interested in every question that is affected by them, it seems to me that notice to the Canadian Government is unnecessary, because the Canadian Government is represented by this Commission. It is your duty to look after the interests of the

⁵³ *Ibid.*, p. 9.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, p. 13.

Canadian Government as well as those of the American Government.”⁵⁶ “That is true”, replied Mr. Powell,

but we have laid down a certain procedure. Now, while the two litigants in a matter of civil procedure can waive anything they see fit and the court will approve of it, yet it is necessary for these two litigants to agree upon the waiver. Otherwise the court will stand by its rules. In this particular matter we have been rapped very severely over the knuckles by Mr. Lansing⁵⁷ and the State Department—for a presumed departure from our rules—that we should stand by our guns. If the other side agrees to it I cannot see any objection we can urge.⁵⁸

After all these and other arguments were over the Commission issued an interim order, accompanied by an opinion in which Commissioner Mignault of Canada referred as follows to the question of obtaining the approval of the Commission for a part of the works.

Mr. Koonce . . . said that the engineers of the War Department had satisfied themselves that the only part of the work which should be submitted for the approval of the Commission was the submerged weir, and they thought that the dredging at Dodges shoal and the construction of the piers for the ice boom would not affect the levels on the north shore so as to require the approval of the Commission under Article III of the Waterways Treaty. It is obvious, in view of the evidence, that this conclusion was erroneous, and the Commission is of the opinion that the whole of the work, and not merely the part concerning the submerged weir should have been submitted for the approval of the Commission as required by Article III of the treaty. . . . The attention of the applicant was several times during the hearing called to the requirements of Article III of the treaty with respect to this dredging, and

⁵⁶ *Ibid.*

⁵⁷ United States Secretary of State.

⁵⁸ Hearings, p. 13.

the Commission is of opinion, in view of the prohibition of this article, that unless some action be taken by the applicant to meet these requirements, the dredging work cannot be considered to have been done lawfully or in accordance with this provision of the Waterways Treaty, because it admittedly affects the "level" and "flow" of the boundary waters.⁵⁹ . . . The High Contracting Parties, in the absence of a special agreement between them with respect thereto [i. e. the boundary waters] have created a tribunal before which all such questions [of use, obstruction or diversion] should be brought, and it would not be conducive to that spirit of fairness and of mutual cooperation with which the treaty should be carried out, for one side to determine in an ex parte manner, and without reference to the other side, questions involving the use, obstruction or diversion of these boundary waters now prohibited by the Treaty except as therein provided.⁶⁰

Rule 9 of the Procedure refers to notice and publication of the application. "As soon as practicable after an application is made as hereinbefore in rule 6 provided for, the secretary of the section of the Commission appointed by the other Government shall forthwith send to such Government a notice in writing that the application has been made and a copy thereof." So far there has been no case where this rule has been a bone of contention.

The second section of this rule, however, seems important. It says:

The secretaries shall also, as soon as practicable after the application is made, cause to be published for three successive weeks in the Canada Gazette, and in two weekly newspapers, published one on each side of the international boundary line nearest the locality in which the use, obstruction, or diversion of waters is proposed to be made, a notice that the application has been

⁵⁹ Opinion, p. 13.

⁶⁰ *Ibid.*

made, and of the nature and locality of the proposed use . . . and that all persons interested therein are entitled to be heard with respect thereto before the Commission.⁶¹

A period of sixty days after the filing of the application is allowed for "the other Government, and with its consent" for any private persons to file their statements in response.⁶²

This rule was invoked in the case of the Watrous Island Boom Company. After the filing of the application on April 6, 1912, it was "served on the Dominion Government".⁶³ Up to November 18, 1912, when the Commission was holding "a special meeting" at Washington, D. C., there had been no reply submitted to the Commission and no answer from the Dominion, under rule 10 of the rules of the Commission, which allows the parties sixty days in which to present a reply to the application.⁶⁴ Consequently Commissioner Tawney asked Counsel Thompson for the Canadian Government whether he had anything "to offer as an excuse for not submitting the answer required in this case under the rules".⁶⁵ The counsel replied: "The Government engineers have been making an investigation of the locality in question. . . . They, at the present time, have such information as enables them to say that the matter should not be dealt with at the present time."⁶⁶ In answer to this Commissioner Tawney pointed out that the practice of the Commission as regards cases of this kind was somewhat analogous "to the practice in courts of justice on both sides of the line; it is, that if the Government or any other

⁶¹ Rule 9, second part.

⁶² Rule 10.

⁶³ Hearings, *W. I. B. Co.*, p. 36.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p. 37.

party is not prepared to answer within the rules, that an application should be presented to the commission for an extension of time. If this matter had been disposed of at Ottawa the commission would have had no means of knowing that the Government intended at all to make answer to the application.”⁶⁷ The difficulty was therefore got over at a later stage during the hearings, when on the motion of the Canadian Counsel an extension of time was allowed by the Commission.⁶⁸

When thus within a certain time statements in response to the application have been made and filed with the Secretary, he “shall send a copy of the same to the Government which shall have made the application or shall have filed the application on behalf of private persons”.⁶⁹ The government or the parties concerned, or both, “may, within thirty days, file a statement or statements in reply and the issues to be determined by the Commission shall be gathered from the application, statement, or statements and reply statement or statements”.⁷⁰ If, in spite of all these documents it would become evident that they do not sufficiently render the subject matter clear so as to enable the Commission “to proceed intelligently”, the Commission has the power to require a more full, definite and complete application⁷¹ or any other necessary document as circumstances would warrant.

Provision is made for any person interested in the subject matter of any application, “whether for or against”, to be “heard by counsel at the final hearing”. Whether this procedure may be observed with or without the consent of

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, pp. 41-42.

⁶⁹ Rule 11.

⁷⁰ *Ibid.*

⁷¹ Rule 12.

his government is not mentioned in this section of the rule. But from the language of the latter part of the same rule, wherein the consent of the government concerned is provided for, it may perhaps be assumed that the procedure in the former part may be carried out without the consent of the appropriate government. The latter part reads that the interested person may, through counsel, *with the consent of his Government*, conduct or assist in conducting all proceedings in the case subsequent to the application.⁷²

If in any case the Commission deems it advisable and advantageous to hold "a preliminary meeting" before the actual hearing on the application begins, with a view to fix or alter plans of hearings, or determine the mode of conducting the inquiry, "the admitting of certain facts or the proof of them by affidavit, or for any other purpose, the Commission may hold such meeting upon such notice to the parties as it deems sufficient, and may thereupon make such orders as it may deem expedient."⁷³ It would appear that this rule would be applicable to parties both public and private insofar as the term "party or parties" are intended to include the two "governments" and other "persons" according to the definitions given in Rule 1.⁷⁴

Wherever the Commission thinks fit, it has the power to "communicate with the parties direct", or to "require answers to such inquiries as it may consider necessary". This procedure could be applied in lieu of the "preliminary meeting" provided for under the above rule.⁷⁵ During the early stages of the hearing on the application of the Watrous Island Boom Company, this rule was brought into operation; the Commission wanted to be better informed on the

⁷² Rule 13.

⁷³ Rule 14.

⁷⁴ See Rule 1.

⁷⁵ Rule 15.

question of levels in the Rainy River as affected by the works of the applicant. Consequently it ordered:

That in the matter of the application . . . for approval of the commission . . . of a boom in the Rainy River . . . the secretaries of the commission be and they are hereby directed to address the applicant for such approval and those who oppose the same, and inquire of them under Rule No. 15 of the rules of procedure of the commission, whether or not the construction of said boom as proposed will affect the natural level or flow of the waters of said river at or in the said boom on the other side of the line, and, if so, to what extent.⁷⁶

The secretaries therefore directed communications to several agencies and received replies to their inquiries.⁷⁷

Rule 16 provided that:

Either party shall be entitled, at any time, before or at the hearing of the case, to give notice in writing to the party in whose application or statement or reply statement reference is made to any document, map, plan, or profile, to produce it for the inspection of the party giving such notice or his attorney or solicitor, and to permit him to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put the same in evidence on his behalf in such proceedings, unless he satisfy the commission that he had sufficient cause for not complying with such notice.⁷⁸

As a rule, subpoenas for the attendance of witnesses and notices for the production and examination of documents may be issued "in the first instance under the signature of the secretary of the section of the country in which the witnesses reside".⁷⁹ But where compelling attendance of

⁷⁶ Hearings, *W. I. B. Co.*, p. 42.

⁷⁷ *Ibid.*, p. 43.

⁷⁸ Rule 16.

⁷⁹ Rule 17.

witnesses or the production of documents is indispensable to the proceedings before the Commission, "all applications for subpoena or other process" have to be "made to the proper courts of either country in which the witnesses reside or the books, papers or documents may be, or by the examiner appointed under rule 19".⁸⁰ In the United States the proper court for these purposes is designated through legislation enacted on March 4, 1911, to be "the circuit court . . . for the circuit within which such session [of the Commission] is held", and that "court is . . . empowered and directed to make all orders and issue all processes necessary and appropriate for that purpose".⁸¹ In Canada the appropriate court for fulfilling the obligations arising from the rules of procedure is "a superior court of the Province within which such session [i. e. of the Commission] is held"; the "judge" of such a court is "authorized and directed" by the legislation of the Canadian Parliament of May 19, 1911, "to make all orders and issue all processes necessary and appropriate. . . ." ⁸² Any such process or notice, in both the countries, should be served by delivering it to the person named in it, or by leaving it with some "adult person", in the former's "dwelling house or usual place of abode or usual place of business".⁸³ Any "literate person" may undertake this service, but he is bound to "make return thereof under oath to the secretary" ⁸⁴ of the section from whom it was received.

The reference to an "examiner" in rule 18 appears in connection with depositions provided for in rule 19. "On

⁸⁰ Rule 18.

⁸¹ 36 Stat. 1364, 61st Cong., Sundry and Civil Appropriation Act, March 4, 1911; H. R. 32909.

⁸² Chap. 28, 1-2 George V, assented to May 19, 1911.

⁸³ Rule 24.

⁸⁴ *Ibid.*

application to the secretary of the section of the Commission in the country where depositions are proposed to be taken, any party may have a commission to take the depositions of witnesses.”⁸⁵ This commission is to be signed by the secretary to whom the application is made, and should contain “the time and place” of the depositions, although the names of the witnesses need not be designated. “The secretary shall specify in the commission the length of notice to be given, in all cases requiring what he may deem ample time to enable the parties to be present”;⁸⁶ he should also, in signing the commission, mention the name of the examiner before whom the depositions are to be taken. The examiner must “in all cases be an official having power in his own country to administer oaths, to issue subpoenas for witnesses to be examined before him. Such witnesses are to testify “under oath or affirmation” and

the parties shall be entitled to attend and examine and cross-examine. The testimony so taken shall be confined to the subject matter in question, and any objection to the admission of evidence shall be noted by the examiner and dealt with by the Commission at the hearing. The examinations or depositions shall take place within 60 days after the time provided in rule 11 (i. e. 30 days)⁸⁷ for the filing of the reply statement. All examinations or depositions taken in pursuance of this rule shall be returned to the secretary who issued the commission, and the depositions certified under the hand of the examiner, without further proof, be used in evidence, saving all just exceptions. The examiner at the time and place appointed in the commission can take the depositions of witnesses offered by any party.⁸⁹

⁸⁵ Rule 19.

⁸⁶ *Ibid.*

⁸⁷ Rule 11.

⁸⁹ Rule 19.

So far, however, this rule does not seem to have been applied; it appears at present conjectural to say how it would be applied in the event of a need arising therefor, because the two contracting countries have not enacted any legislation whereby the sectional secretaries of the Commission may call upon the services of an examiner who must "in all cases" be "an official having power in his own country to administer oaths" and "issue subpoenas".^{89a} There are, indeed, officials of various descriptions on either side of the line who would be capable of administering oaths and issuing subpoenas within their appropriate jurisdictions. The secretary concerned, therefore, may issue an examining commission to any one of them, irrespective of the official status of the person so commissioned.

Rule 20 provides for final hearings; the time and places for these are to be fixed by the chairmen of the two sections of the Commission "not less than 60 days after the time provided for filing the reply-statement, and the Commission will then hear oral and documentary evidence and evidence which may have been taken by the parties by deposition".⁹⁰ If after all this the Commission deems it necessary to require further evidence, it may do so, and the parties may offer it "either viva voce or by the deposition taken before an examiner". The Commission, moreover, has the power to restrict the number of counsel to be heard, to decide what interests may be consolidated for the purpose of the hearing, and to require printed briefs or factums to be submitted by the parties.⁹¹ During the initial hearings on the application of the Watrous Island Boom Company, the Dominion Government through counsel submitted its position orally. Com-

^{89a} But see U. S. Stat. 1929-30, Public No. 524, pp. 1005-6; 71st Cong., 2nd Sess.

⁹⁰ Rule 20.

⁹¹ Rules 20-21.

missioner Casgrain (Canada) at that time pointed out to the counsel that the Commission's "rules provide also that the statement in reply should be printed and a certain number of copies furnished".⁹² The counsel submitted that he "could have the answer printed".⁹³ A similar incident occurred in connection with the application of the New Brunswick Electric Power Commission; here Counsel Milligan representing the Canadian National Railway did not furnish his case in print. Commissioner Clark (U. S.) therefore called Mr. Milligan's notice to the fact that "the rules of the Commission require that matters of that sort be presented in printed form".⁹⁴ Mr. Milligan replied that "if the Commission would like that put in printed form we will have it printed".⁹⁵ But Commissioner Sir William Hearst (Canada) suggested to his colleagues that they might "well forgive Mr. Milligan as he has put it in nice shape as it is, although it does not strictly comply with the rules".⁹⁶ Commissioner Clark assented to this proposition and that settled the difficulty.⁹⁷

The last section of rule 20 provides that the hearings in any case, "when once commenced, shall proceed, so far as in the judgment of the Commission may be practicable, from day to day".⁹⁸ These hearings, however, need not be held before the entire panel of the Commission. "A majority of the Commission" may conduct such proceedings.⁹⁹ Here it may be observed that in the case of the Watrous Island Boom Company, which involved several procedural questions, the

⁹² Hearings, *W. I. B. C.*, p. 37.

⁹³ *Ibid.*, p. 39.

⁹⁴ Hearings, *N. B. E. P. Com.*, p. 51.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Rule 20.

⁹⁹ Rule 22.

Commission ordered during the hearings that the questions growing out of the application of the company "be referred to two members of the commission to investigate, and, if in their opinion desirable, to take such testimony as they may consider necessary to be laid before the commission for its final determination . . .".¹⁰⁰ Commissioners Tawney and Casgrain were appointed in pursuance of this order.¹⁰¹ A similar procedure was adopted in the case of the St. Croix River Fishways; after the adjournment of the first hearing on August 3, 1923, when all the Commissioners were present, the second hearing took place a fortnight later when only "a committee of the Commission, composed of Mr. H. A. Powell and Mr. Clarence D. Clark, met at St. Stephen," New Brunswick.¹⁰² Thus it would appear that as circumstances demand, the Commission may appoint some of its own members, not necessarily a majority always, to hold hearings on applications. Applications and statements may be amended by the permission of the Commission in cases "where substantial justice requires"¹⁰³ such amendments. During the hearings on the application of the Michigan Northern Power Company Counsel Koonce wanted to bring about certain alterations in the application that had been filed with the Commission, in connection with the plans for the construction of certain compensating works in the St. Mary's River at the Sault Ste. Marie, Michigan. The counsel therefore said,

As this is the period for correction of errors in pleadings, I wish to say that I notice in the brief of the United States that we ask the approval by your commission of certain plans approved by the Secretary of War and the Chief of Engineers under date of November 11, 1913. I simply want to amend

¹⁰⁰ Hearings, *W. I. B. Co.*, p. 53.

¹⁰¹ *Ibid.*, p. 54.

¹⁰² Hearings, *St. Croix River Fishways*, p. 65.

¹⁰³ Rule 23.

that prayer by asking your approval of so much of these plans bearing the approval of the Secretary of War, and the Chief of Engineers under date of April 6, 1914, as lie in American territory.¹⁰⁴

Commissioner Tawney acting as the chairman on the occasion, pointed out that "in order to keep the record from becoming confused", Mr. Koonce would do well to "reduce" his "proposed amendment to writing and present it in that way; then we will formally pass upon it."¹⁰⁵ Mr. Koonce complied with this suggestion.¹⁰⁶

In the case of the Greater Winnipeg Water District also the original application needed amendment in order to bring the subject matter within the purview of the Commission's jurisdiction. The original application prayed for the diversion of the waters of Shoal Lake only, which is an entirely Canadian water. The Commission would have lacked jurisdiction if, during the hearings, the application had not been amended, in pursuance of the evidence submitted in the case, which conclusively proved that at least at times the Water District would be indirectly diverting the waters of the Lake of the Woods, which is a boundary water. Consequently the phrase "and Lake of the Woods"¹⁰⁷ was inserted in the application and the Commission exercised its jurisdiction.

In connection with the case of the Watrous Island Boom Company also one reads during the hearings the Commission "ordered, That the applicant file with the Commission, on or before May 1, 1913, an amended plan of the said boom . . .".¹⁰⁸ In all necessary cases therefore the Commission

¹⁰⁴ Hearings, *M. N. P. Co.*, p. 137.

¹⁰⁵ *Ibid.*, pp. 137-138.

¹⁰⁶ *Ibid.*, p. 138.

¹⁰⁷ Hearings, *G. W. W. District*, pp. 92-93.

¹⁰⁸ Hearings, *W. I. B. Co.*, p. 54; a similar situation arose in connection with the Kettle Falls case.

has thus allowed, in accordance with the provisions of rule 23, the amendment of applications. Further, the latter part of the same rule provides that "the time for the filing of any paper or the doing of any act by these rules required may be extended likewise"¹⁰⁹ as in the case of amendments. This section also was applied in connection with the application of the above Boom Company.

Whereas under Article 23 of the said rules the commission may extend the time for the filing of any paper, and¹¹⁰

Whereas substantial justice requires that the time should be extended for the filing of said statement by the Government of Canada,

This Commission grants the application now made on behalf of the Government of Canada, allows the filing of a statement in behalf of the said Government, *nunc pro tunc*, provided that the said statement be filed at once and time be given to the applicants to reply to such statements.¹¹¹

In other words, the Commission allows, according as circumstances demand and justify, amendments and time extensions in the best interests of the parties as well as for the proper understanding of the subject matter over which its approval and decision are required. Furthermore, in the course of the proceedings the Commission may make "any order which it deems excellent and necessary to meet the ends of justice and to effectually carry out the true intent and meaning of the Treaty".¹¹²

Any matter submitted to the Commission may be heard, as elsewhere noted, by a majority, or a committee of the Commission, but "less than the whole number of the Commission

¹⁰⁹ Rule 23.

¹¹⁰ Hearings, *W. I. B. Co.*, p. 41.

¹¹¹ *Ibid.*, p. 42.

¹¹² Rule 27.

shall not proceed to finally consider and determine any matter, proceeding or question which the Treaty creating the Commission, either in terms or by implication, requires or makes it the duty of the Commission to decide".¹¹³ This, however, does not seem to imply that in all cases presented to the Commission under its judicial authority it should hand down unanimous decisions, because Article VIII of the treaty provides that "the majority of the Commissioners" have the power "to render a decision". In the very first opinion delivered by the Commission, in the Kettle Falls case,¹¹⁴ four of the Commissioners took one view and the other two dissented from it; there was no unanimous opinion. But it may be properly urged perhaps that in this particular case the Commission did not pass upon the merits of the case except upon a question of jurisdiction arising from the provisions of Articles III and XIII of the treaty. If this view is adopted, then the remarks of Commissioner Turner, made during the hearings on the application of the Creston Reclamation Company, to the effect that he was "pleased to say that in the work that we accomplished we have always reached unanimous decisions",¹¹⁵ would be quite in accord with fact. The opinion in the first case was delivered in 1913, when Mr. Turner was a member of the Commission, while his remarks in the Creston case were made in 1927. What seems to be important is that there is no restriction that the Commission should render unanimous decisions; nevertheless all the members must be present when the decisions are pronounced.

As soon as a case is brought to rest by the parties, the Commission need not straightway proceed to its decision.

When in the opinion of the Commission it is desirable that a

¹¹³ Rule 22.

¹¹⁴ Docket i, Rainy River Improvement Co.

¹¹⁵ *Hearings, Creston R. Co.*, p. 17.

decision should be rendered which affects navigable waters in a manner or to an extent different from that contemplated by the application and plans, the Commission will, before making a final decision, submit to the Government transmitting the application a draft of the decision, and such Government may file with the Commission a brief or memorandum thereon which will receive due consideration by the Commission before its decision is made final.¹¹⁶

Although this rule does not seem to have been applied, its place in the procedure seems appropriate in so far as it provides room for better understanding between the applicant's government and the Commission.

When in the above forms all the necessary measures have been carefully taken, the Commission renders its final decision. If, however, in any cases under Articles III, IV and VIII the Commission is "evenly divided" in its decision, "separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them it shall be reduced to writing in the form of a Protocol and shall be communicated to the Commissioners who shall take such further proceedings as may be necessary to carry out such agreement."¹¹⁷ Article VIII, however, is silent as regards the procedure which may have to be adopted by the Contracting Parties in case they are unable to reach an agreement on a decision of the Commission in which it is evenly divided. But a possible solution seems to exist in the provisions of Articles X and IX respectively of the treaty, which will be discussed at a later stage.¹¹⁸

According to Rule 25, all expenses in connection with the

¹¹⁶ Rule 26.

¹¹⁷ Article viii.

¹¹⁸ See *infra*, pp. 388, 389.

proceeding before the Commission upon applications which are of a private character " shall be paid by the party on whose behalf or at whose request such cost or expense is incurred, except as otherwise ordered by the Commission ".

Finality of Decisions.

A word has to be added here respecting the nature of the decisions which the Commission may render under Articles III, IV and VIII. The last part of the last Article has provided that a majority of the Commission " shall have power to render a decision ".¹¹⁹ The Article does not say, nor does any other Article of the treaty, nor do the rules of procedure, that an appeal lies from the decisions of the Commission to any other judicial institution whether national or international. It does, on the other hand, provide a procedure for what may be regarded as tie decisions.

In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.¹²⁰

Apart from these even decisions, all other decisions under Articles III, IV and VIII would appear to be final.

In the hearings of the Michigan Northern Power Company, Counsel Sears, on their behalf, submitted that: " The decision of this tribunal [i. e. the Commission] is unique. There is no review; there is no appeal; the matter is ended;

¹¹⁹ Article viii.

¹²⁰ *Ibid.*

... ”¹²¹ In the same case when the question was discussed whether or not the jurisdiction of the Commission was final, Commissioner Glenn (U. S.) pointed out that, in spite of what his confreres on the panel might feel about it, he thought the Commission had “final jurisdiction”.¹²² Commissioner Powell, explaining the powers of the Commission under Article VIII, said to one of the witnesses¹²³ that “the two sovereign powers having consented to lay this matter judicially before us, we are supreme”.¹²⁴ During the hearings on the St. Croix River Power Company and the Sprague’s Falls Manufacturing Company, the Commissioner took the view that: “These two great sovereign powers [the United States and Great Britain] have seen fit to put us in the position in which we are above themselves.”¹²⁵ Speaking on the Commission’s power to compensate parties affected injuriously, Mr. Powell indicated “We can force the matter [of remuneration] over the New Brunswick territory; and the treaty says that we shall give to the people of New Brunswick who are affected unfavorably by the work, remuneration”.¹²⁶ In his independent opinion in the St. Lawrence River Power Company Mr. Powell says:

The International Joint Commission is a new experiment. In respect to any dispute growing out of the uses, obstructions or diversions of the boundary waters, either the United States or Canada can invoke its jurisdiction and have the dispute decided so far as the Commission is able so to decide it in accordance with the principles of law and justice. This decision is binding upon the other party.¹²⁷

¹²¹ Hearings, *M. N. P. Co.*, p. 79.

¹²² *Ibid.*, p. 87.

¹²³ Mr. Leonard Davis, Engineer, *ibid.*, p. 56.

¹²⁴ *Ibid.*, p. 76.

¹²⁵ Hearings, *St. Croix W. P. Co.*, p. 132.

¹²⁶ *Ibid.*

¹²⁷ Powell’s Opinion, *St. Lawrence R. P. Co.*, p. 22.

During the hearings on the application of the Greater Winnipeg Water District Commissioner Tawney remarked that "our jurisdiction is final here, and we hear and determine".¹²⁸ In the proceedings on behalf of the application of the New Brunswick Electric Power Commission, Counsel Lafleur, representing the applicant, submitted that

these international waters are subject to your [the Commission's] sovereignty and jurisdiction and that you are supreme judges of all matters in connection with their use and with their development . . .

I think there is no appeal from your decision. I think the whole matter has been committed to your charge, and that to that extent both High Contracting Parties have abdicated or resigned a part of their sovereign rights. Otherwise the Commission would be an unworkable Commission . . .¹²⁹

During the hearings of the St. Croix Water Power Company's application, Counsel Koonce thought that the duty of the Commission in the case was one of making "recommendation".¹³⁰ The Attorney General for the Province of New Brunswick¹³¹ also seems to have been under the same impression.¹³² To both of them Commissioner Powell replied, "We, [the Commission] do not make a recommendation in this case; we decide; we make an absolute decree".¹³³

Along with these divers remarks of Commissioners and counsel in the various cases one may add that, in the opinion in the case of the Michigan Northern Power Company, the Commission held that "it is specially significant that the Governments have not reserved to themselves any responsi-

¹²⁸ Hearings, *G. W. W. District*, p. 87.

¹²⁹ Hearings, *N. B. E. P. Com.*, p. 96.

¹³⁰ Hearings, *St. Croix W. P. Co.*, p. 68.

¹³¹ Mr. B. M. Baxter.

¹³² Hearings, *St. Croix W. P. Co.*, p. 69.

¹³³ *Ibid.*

bility whatever for protecting the rights and interests of the people on the other side of the line from injury on account of the obstructions and diversions proposed" in the boundary waters.¹³⁴ That responsibility therefore would seem to have been finally lodged in the powers delegated by the two governments to the Commission, and to that extent, and in the absence of the treaty or other arrangements, no appeal would seem to lie from the Commission's decisions; they are final under Articles III, IV, and VIII. So far, such decisions have been unanimous, and the fact that up to the present time the Commission has not encountered the necessity of having to resort to the procedure prescribed in Article VIII for purposes of adjusting evenly divided decisions, should indeed be a source of genuine pride to the Commission, commensurate with its services, while it should undoubtedly instill a certain measure of hope and confidence on the part of the two neighboring nations fronting the common boundary in the organization set up by them for the amicable settlement of their mutual differences. In this connection it may be well to recall what the Honorable Mr. Elihu Root said in the Senate on February 27, 1913:

I do not think we shall ever see the time when this Commission will not be needed to dispose of controversies along the boundary line in their inception; furnishing a machinery ready at hand for people to get relief and redress without going into the long processes of diplomatic correspondence. I think it will have to continue as long as the ordinary courts of the country continue.¹³⁵

¹³⁴ Opinion, *M. N. P. Co.*, p. 23.

¹³⁵ Congressional Record, vol. 49, part 5, p. 4173.

CHAPTER IX

CONCLUSIONS

FROM the preceding study certain conclusions seem to follow. The first is that in handling waters of an international concern which form the common boundary between two or more nations, the most commendable procedure seems to be to institute a special administration. In such an administration the principle of equality of states in matters of organization and representation may be observed with advantage, in so far as its observance might contribute to dispel a probable suspicion on the part of the weaker States, or States that are not yet fully developed. The dictum of Chief Justice Marshall that "Russia and Geneva have equal rights" in international law, may be applied as well to international organizations designed to bring about effective and beneficial administration over common boundary waters.¹ Instances nevertheless may be pointed out where rivers have formed the boundary between more than two nations, and where, on the commission created for their international administration, the rule of equality does not seem to have been observed. Such for example would appear to be the case in the Central Commission on the Rhine. There France is given as many votes as Prussia, Hesse, Bavaria and Baden put together; in addition, the presidency of the commission is also vested in France. Professor Joseph P. Chamberlain, maintains that: "No good reason can, however, be given for the French presidency of the Commis-

¹ The Antelope, 10 Wheaton 66, 122, referred to in Hyde, *op. cit.*, p. 20, footnote.

sion";² the learned author states that "the reason for the number of votes on the Commission is apparent and brings out the political as opposed to the economic side of the Commission".³ This representation appears to be unsatisfactory, especially when it is noticed that the "French interest, based on bank ownership, is small compared with the German or with the Dutch, if density of commerce be considered".⁴ Such a compositional defect, however, does not seem to be present in the organization of the International Commission on the Danube, which consists "of eight riparian and three non-riparian members".⁵ Nor is it present in the International Boundary Commission on the Rio Grande,⁶ nor in the International Joint Commission between the United States and the Dominion of Canada on the boundary waters. In the case of the last two, there are only two nations interested in each of the commissions, and that fact perhaps renders the matter less intricate than that of the Central Commission on the Rhine.

If equality of states is set aside for the principle of proportionate representation, based either on wealth or population, it is more than probable that smaller nations whose border-interests are inevitably entangled with those of greater nations, would entertain the not unreasonable apprehension lest their interests should be either submerged in or frustrated by those of their powerful neighbors. Such a natural apprehension breeds suspicion, and does not furnish an incentive to cooperation; and cooperation is vital for efficiency, not only in matters of administration, but also in

² Chamberlain, *Regime of International Waters*, p. 279.

³ *Ibid.*

⁴ *Ibid.*, pp. 279-280.

⁵ *Ibid.*, p. 131.

⁶ See Article ii, Boundary Convention, Malloy, *op. cit.*, vol. i, p. 1167.

securing the best benefits from a common endeavor. It is therefore a matter of some satisfaction that Mexico, a smaller nation than the United States, has an equality of right and representation on the commission through which she shares the burden of the common problems that arise on the Rio Grande. The satisfaction in the case of the International Joint Commission is greater, however, and naturally so, considering the vast extent of the territory that forms the common frontier between the United States and her neighbor to the north, the Dominion of Canada. Perhaps not yet fully matured to the same extent as the United States, commercially, industrially, or from the standpoint of population, that Canada is facing the dawn of an industrial, economic and agricultural "golden age", does not admit of any serious doubts. In view of that fact, to see earnest cooperation and a recognition of the principle of equality of representation between the United States and Canada in their common enterprises, should be a source of happiness to anyone who ardently cherishes international peace and good will among nations. Consequently, the responsibility that is delegated to the International Joint Commission is one, to use Commissioner Tawney's words, "of promoting closer and more direct relations between the two great people on this continent who have the same language, come from the same race, have the same common fountain of law, the same traditions, and similar institutions of government, as well as the same ambitions for the continued success of their respective governments".⁷ In fact, it is a mission "of blazing the trail for the judicial settlement of all disputes where they occur between any two great nations".⁸

The second conclusion one may draw from the preceding study seems to be that when once an international régime is

⁷ *Papers of the I. J. C.*, p. 106.

⁸ *Ibid.*

established over waters of a common concern, such a régime should be endowed with all the necessary powers, whether they be judicial, legislative, investigative, administrative or technical. In this connection it is to be remarked that the International Joint Commission has no powers of police to carry out its decisions under Articles III, IV, VIII and even X of the treaty of 1909. It has to depend on either or both of the Governments for such purposes. No doubt the Governments are bound by the decisions of the Commission and may therefore be trusted to carry them out in a spirit of *uberrima fides*. Consequently the apparent absence of executive powers need not necessarily be a defect for the working of the Commission. But no sound reason can be ascribed for the absence of a power to hear civil suits for damages to be assessed directly rather than indirectly as was done in the cases of the New Brunswick Electric Power Commission and the St. John River Power Company.⁹

Having delegated an authority over properties and rights which might otherwise have been designated as distinctly national, it would have been equally appropriate to grant a power of assessment where the improper and unjust use of these properties and rights caused injury to legitimate interests on either side. At present, whether or not the Commission has the power to assess damages directly as a court of law, is problematical, notwithstanding the consensus of opinion of the various counsel who have appeared in hearings before the Commission to the contrary.¹⁰ In this respect the Joint Commission seems to resemble the European Commission on the Danube. This commission "has no power to punish crimes or to hear civil suits for damages, for example, in case of collision or in case of dispute over

⁹ See *supra*, chap. iii, on Compensation.

¹⁰ *Ibid.* Cf. the "recommendation of an indemnity in the Trail Smelter Case, *supra*, chap. vi, p. 310.

non-fulfilment in the port in the terms of the charter".¹¹ The Roumanian authorities are responsible for these purposes,¹² while in the case of the Joint Commission the two Governments on the two sides of the boundary provide for such contingencies.

On a question of collision it may be interesting to see whether or not the Commission may act if in a navigable canal two ships belonging to the two territorial sovereigns collide and sink and raise the level of the waters while obstructing the free passage of other vessels. Under the second rule of preference provided for in Article VIII the Commission has to consider the uses of the boundary waters and connecting canals for purposes of navigation. If then such an emergency arises, can the Commission take any initial action to check or temporarily stave off the consequences? If the Commission may, may it also conduct an investigation upon its own initiative, placing reliance on Article VIII, with a view to establishing the source of the incident and thereby the blame therefor? In other words, in the absence of a specific prohibition in any of the provisions of the treaty of 1909, and in view of the responsibility of safeguarding the natural level and flow of the boundary waters and of providing for the uses of these waters for navigation under Article VIII, will the Commission be acting *ultra vires* if it initiates action in the absence of any request from the Governments? It is hard to venture a specific answer to this question.

Another point of interest regarding the powers of the Joint Commission is whether or not, as in the case of damages, it has the power to establish boards of control wherever necessary.¹³ If the Commission has no such power,

¹¹ Chamberlain, *op. cit.*, p. 92.

¹² *Ibid.*

¹³ See *supra*, chap. iii, Boards of Control.

then from the nature and purpose of these useful agencies, it may be observed that such a lack appears to be an undesirable defect. This difficulty holds as well for the Commission's power to "approve" suitable and adequate provisions" which applicants propose against possible injuries likely to arise from their contemplated projects. On the whole, if a personal opinion may be ventured on the point of powers, it seems highly desirable that the Commission should be given specific powers, not merely to approve but to order, and if necessary, to create such provisions themselves, whether they be remedial or protective works or assessment of damages or setting up boards of control; the Commission should have an adequate power of initiative in all these matters rather than be forced to depend on the two Governments every time a contingency arises.

A third and final conclusion seems to be that the creation of the International Joint Commission is a legacy of peace to the United States and Canada. Not only are these two countries related socially, racially and culturally, but also through vital economic ties. "Canada, it may be remarked, is the largest single field of American foreign investment and has attracted about one-fourth of all capital exported from the United States."¹⁴ If this is the case, is it not one solid good reason for peace and neighborliness to prevail between these two countries? Considering, moreover, the fact that the hundred and more years of peace between these two nations had been "preceded by long periods of bitterness and savage strife",¹⁵ the desirability of perpetuating that peace and its concomitant, cordial and amicable rela-

¹⁴ Moon, Parker Thomas, *Imperialism and World Politics* (New York, 1930), p. 453; see also Scott Nearing and Joseph Freeman, *Dollar Diplomacy* (New York, 1925), *passim*; Dunn, R. W., *American Foreign Investments* (New York, 1926).

¹⁵ Hughes, Charles Evans, *The Pathway of Peace*, p. 18.

tions which still prevail, would appear to be indispensable. It was perhaps the realization of this fact that inspired and impelled Alexander Hamilton, "the apostle of both national strength and international peace", to suggest to President Washington in 1794 "the limitation of armaments on the Great Lakes".¹⁶

Although the immortalization of Hamilton's vision took place only in 1817 by the Rush-Bagot agreement of that year, which eventuated three years after the memorable Peace of Ghent, the fact can never be obliterated from the preserving pages of the history of international relations that that "undefended line of over 5,000 miles is at once a memorial and a prophecy—a memorial of the past triumphs of reasonableness and a prophecy that all future problems will be solved without breach of amity".¹⁷ These and various other treaties and agreements may aptly be regarded as the strong pillars of international understanding and good will which the United States, Great Britain and the Dominion of Canada have been erecting; and when one comes to the treaty of 1909 immediately one more pillar is established, and over the entire structure of these pillars stands the memorial dome to Anglo-American peace—the International Joint Commission.

Three good reasons may be marshalled in favor of these remarks: first, the creation of the Joint Commission provides a medium for direct communication between the two great nations of the North American continent. Here is a judicial forum established, before which the parties, whether they be the Governments of the United States and Canada on their own behalf or in their capacity as *parens patriae* on behalf of and along with their respective States, Provinces and people, interested or involved in any cause of action arising from the use, obstruction or diversion of the boundary

¹⁶ *Ibid.*

¹⁷ *Ibid.*

waters, may legally fight it out as in their own respective national law courts and win a decree from which no appeal can lie, although the two governments may take up the issue and deal with it, subsequent or prior to its disposal by the Commission, and conclude a "special agreement" under Articles II and XIII of the treaty of 1909. But when once a decree is issued by the Commission, it would appear a practically impossible position to assume that the Governments would enter into a special agreement and thereby set aside the Commission's decree, unless the issue is one of vast importance to their vital interests. It is therefore perhaps appropriate to remark that in creating this international court of the Joint Commission the United States and Canada established a check on frictions likely to arise on the boundary and connected waters. Consequently one way to peace is open, considering that international waters "are among the bones of contention of mankind".¹⁸

The second reason is that under Article X the Commission has the resources of a Court of Arbitration. It is true that there seems to rest no obligation on the two governments to submit any issue to the commission under this article. But that lack of compulsory reference does not in any way nullify the possibilities for peace inherent in Article X. Consequently here is a second check on international frictions between the United States and Canada, another door to the way of peace. One of the striking notes of this Article is that it makes no provision for the contracting parties to reserve from reference to the Joint Commission so-called "questions of honor" or "questions of vital interests", or the still newer formula of questions of "domestic jurisdiction".¹⁹ It merely says: "Any question or matter

¹⁸ Kaeckenbeck, *International Rivers* (Grotius Society Publication no. 1, London, 1918), preface, pp. iii-iv.

¹⁹ Shotwell, James T., *War as an Instrument of National Policy*, p. 257.

of difference. . . . involving the rights, obligations or interests " of the parties may be referred to the Commission for a decision. It is interesting to note in this connection that in 1910, the year in which he proclaimed the treaty of 1909, President Taft said:

Personally I do not see any reason why matters of national honor should not be referred to courts of arbitration as matters of private or national property are. I know that is going further than most men are willing to go, but I do not see why questions of honor should not be submitted to tribunals composed of men of honor, who understand questions of national honor, and abide by their decision as well as any other questions of difference arising between nations.²⁰

This opinion of Mr. Taft was later commented upon by Sir Edward Grey, in the English House of Commons, as "pregnant with consequences very far reaching".²¹ From the language of Article X of the treaty of 1909, therefore, one may hope that all these undesirable maxims of "honor", "vital interest", and the like, have been ostracised, and that in so doing the two nations have driven another nail in *the door of Janus*, whom nations have not yet controlled fully nor quieted down through their evasive phraseology.

Thirdly, where a judicial settlement is impossible, failing the resources of Articles III, IV, VIII and X of the treaty of 1909, the gates of the Commission are still ajar for the two governments to enter and seek an investigation, report, conclusion and recommendation at the hands of the Joint Commission on an issue that might assume undue proportions and be a source of serious misunderstanding between them. This is the function which the Commission fulfils as an inquiring and conciliating agency. Usually, it is pointed out, few

²⁰ Perris, H. S., *Pax Britannica* (New York, 1913), pp. 286-287.

²¹ On March 13, 1911, *ibid.*, p. 286.

commissions of inquiry or conciliation "ever have any work to do; the machinery grows rusty; . . . There has not been enough business before the ordinary Bryan Commission²² to keep it genuinely alive".²³

This dictum has no application to the Joint Commission. Although it has handled only about six cases to date in its inquiring and conciliating capacity during the twenty years of its existence, the fact should be kept in mind that it is the same agency that has handled nineteen other cases in its judicial role. No odium of lethargy can attach to the Commission. This machinery has not grown rusty; probably it never will; therefore the time also may never come when Americans and Canadians will ask with Charles James Fox whether it is "dangerous for nations to live in amity with each other".²⁴

The example of the United States and Canada may well be commended to other nations. At the Lausanne Conference in 1923, Lord Curzon spoke of the International Joint Commission as a possible model for the adjustment of differences at the Dardanelles. In a series of lectures at Cambridge University in 1925 Sir Robert Falconer, president of the University of Toronto, made the International Joint Commission the subject of an address. The Prime Minister of Canada, W. L. Mackenzie King, has been instrumental in bringing it before statesmen at the League of Nations in Geneva. One most notable recent reference by Aristide Briand is reported also from Geneva. The French Minister spoke of the commission of conciliation and arbitration between Canada and the United States as having worked in an exceedingly satisfactory manner. According to the reported interview with a German newspaper-

²² See *supra*, Introduction, p. 31.

²³ Shotwell, *op. cit.*, p. 259.

²⁴ Ponsonby, Arthur, *Now is the Time* (London, 1925), Title page quotation from Charles James Fox, English House of Commons, Feb. 3, 1800.

man, he added that it would serve as a model for the Franco-German frontier. While the International Joint Commission is being thus commended abroad, it may possibly begin to be discovered by a larger public on the North American continent.²⁵

Just as the League of Nations is not an end in itself, but a means "to make effective the will to peace of the peoples of the world",²⁶ the International Joint Commission is not an end in itself but a means to uphold and foster peace between the people of America and Canada. "Our protection is our fraternity, our armour is our faith; the tie that binds more firmly year by year is ever-increasing acquaintance and comradeship through interchange of citizens; and the compact is not of perishable parchment but of fair and honorable dealing which, God grant, shall continue for all time."²⁷

Indeed peace between the United States and Canada is indispensable but peace between America and the rest of the world is also imperative. As Dr. Nicholas Murray Butler, the distinguished President of Columbia University said,

Americans have a peculiar responsibility toward the political organization of the world. . . . Our professions and our principles are in accord with the highest hopes of mankind. We owe it to ourselves . . . that . . . we shall cultivate at home and in our every relation, national and international, that spirit of justice which we urge so valiantly upon others. *Si vis pacem, para pacem.*²⁸

One substantial contribution to the realization of this exhortation is the International Joint Commission.

²⁵ Quoted in the *Papers of the I. J. C.*, p. 70.

²⁶ Viscount Cecil, *The Way of Peace* (London, 1928), p. 13.

²⁷ Hughes, *op. cit.*, p. 19; Mr. Hughes seems to quote President Harding.

²⁸ Butler, Nicholas Murray, *The International Mind* (New York, 1912), p. 43: "If thou wish peace, prepare for peace."

APPENDIX A

TREATY¹ BETWEEN THE UNITED STATES AND GREAT BRITAIN RELATING TO BOUNDARY WATERS, AND QUESTIONS ARISING BETWEEN THE UNITED STATES AND CANADA.

(Treaty Series, No. 548)

by the President of the United States of America

A PROCLAMATION

Whereas a Treaty between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, was concluded and signed by their respective Plenipotentiaries at Washington on the eleventh day of January, one thousand nine hundred and nine, the original of which Treaty is word for word as follows :

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involv-

¹ Redmond, *Treaties, Conventions, International Acts, etc. between the United States of America and Other Powers*, vol. iii, pp. 2606-2616.

ing the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends, and for that purpose have appointed as their respective plenipotentiaries :

The President of the United States of America, Elihu Root, Secretary of State of the United States; and

His Britannic Majesty, the Right Honorable James Bryce, O.M., his Ambassador Extraordinary and Plenipotentiary at Washington;

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following articles :

Preliminary Article

For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

Article I

The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters

of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof.

Article II

Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

Article III

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line, and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

Article IV

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

Article V

The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both Parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.

So long as this treaty shall remain in force, no diversion of the waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second.

The prohibitions of this article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation.

Article VI

The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River. The provisions of Article II of this treaty shall apply to any injury resulting to property in Canada from the conveyance of such waters through the Milk River.

The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty under the direction of the International Joint Commission.

Article VII

The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada composed of six commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

Article VIII

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

- (1) Uses for domestic and sanitary purposes;
- (2) Uses for navigation, including the service of canals for the purposes of navigation;
- (3) Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

Article IX

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may

be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

Article X

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor General in Council. In each case so referred, the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an umpire chosen in accordance with the procedure prescribed in the fourth, fifth, and sixth paragraphs of Article XLV of The Hague Convention for the pacific settlement of international disputes, dated October 18, 1907. Such umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.

Article XI

A duplicate original of all decisions rendered and joint reports made by the Commission shall be transmitted to and filed with the Secretary of State of the United States and the Governor General of the Dominion of Canada, and to them shall be addressed all communications of the Commission.

Article XII

The International Joint Commission shall meet and organize at Washington promptly after the members thereof are appointed, and when organized the Commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction by the two Governments. Each Commissioner, upon the first joint meeting of the Commission after his appointment, shall, before proceeding with the work of the Commission, make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this treaty, and such declaration shall be entered on the records of the proceedings of the Commission.

The United States and Canadian sections of the Commission may each appoint a secretary, and these shall act as joint secre-

taries of the Commission at its joint sessions, and the Commission may employ engineers and clerical assistants from time to time as it may deem advisable. The salaries and personal expenses of the Commission and of the secretaries shall be paid by their respective Governments, and all reasonable and necessary joint expenses of the Commission, incurred by it, shall be paid in equal moieties by the High Contracting Parties.

The Commission shall have power to administer oaths to witnesses, and to take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction under this treaty, and all parties interested therein shall be given convenient opportunity to be heard, and the High Contracting Parties agree to adopt such legislation as may be appropriate and necessary to give the Commission the powers above mentioned on each side of the boundary, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in proceedings before the Commission. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

Article XIII

In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion.

Article XIV

The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as pos-

sible and the treaty shall take effect on the date of the exchange of its ratifications. It shall remain in force for five years, dating from the day of exchange of ratifications, and thereafter until terminated by twelve months' written notice given by either High Contracting Party to the other.

In faith whereof the respective plenipotentiaries have signed this treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 11th day of January, in the year of our Lord one thousand nine hundred and nine.

(Signed)	JAMES BRYCE	SEAL
(Signed)	ELIHU ROOT	SEAL

AND WHEREAS the Senate of the United States by their resolution of March 3, 1909 (two-thirds of the Senators present concurring therein) did advise and consent to the ratification of the said Treaty with the following understanding, to wit:

"Resolved further, as a part of this ratification, That the United States approves this treaty with the understanding that nothing in this treaty shall be construed as affecting, or changing, any existing territorial or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's river at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's river, within its own territory, and further, that nothing in this treaty shall be construed to interfere with the drainage of wet swamp and overflowed lands into streams flowing into boundary waters, and that this interpretation will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will, in effect, form part of the treaty;"

AND WHEREAS the said understanding has been accepted by the Government of Great Britain, and the ratifications of the two Governments of the said treaty were exchanged in the City

of Washington, on the 5th day of May, one thousand nine hundred and ten;

Now, THEREFORE, be it known that I, WILLIAM HOWARD TAFT, President of the United States of America, have caused the said treaty and the said understanding, as forming a part thereof, to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this thirteenth day of May
in the year of our Lord one thousand nine hundred
SEAL and ten, and of the Independence of the United
States of America the one hundred and thirty-
fourth.

By the President:
P C KNOX
Secretary of State

WM H TAFT

PROTOCOL OF EXCHANGE

On proceeding to the exchange of the ratifications of the treaty signed at Washington on January 11, 1909, between the United States and Great Britain, relating to boundary waters and questions arising along the boundary between the United States and the Dominion of Canada, the undersigned plenipotentiaries, duly authorized thereto by their respective Governments, hereby declare that nothing in this treaty shall be construed as affecting, or changing, any existing territorial, or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's River at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and or navigation canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's River, within its own territory; and further, that nothing in

this treaty shall be construed to interfere with the drainage of wet, swamp, and overflowed lands into streams flowing into boundary waters, and also that this declaration shall be deemed to have equal force and effect as the treaty itself and to form an integral part thereto.

The exchange of ratifications then took place in the usual form.

In witness whereof, they have signed the present Protocol of Exchange and have affixed their seals thereto.

DONE at Washington this 5th day of May, one thousand nine hundred and ten.

PHILANDER C KNOX

SEAL

JAMES BRYCE

SEAL

APPENDIX B

RULES OF PROCEDURE OF THE INTERNATIONAL JOINT COMMISSION

ADOPTED PURSUANT TO ARTICLE XII OF THE TREATY BETWEEN
THE UNITED STATES AND GREAT BRITAIN, SIGNED JANUARY
11, 1909, PROMULGATED FEBRUARY 2, 1912

The International Joint Commission, by virtue of the provisions of Article XII of the Treaty between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the Dominions beyond the Seas, Emperor of India, dated the 11th day of January, 1909, hereby adopt the following rules of procedure:

Definitions

1. In the construction of these rules and the forms herein referred to (unless the context otherwise requires) words importing the singular number shall include the plural, and words importing the plural number shall include the singular; the term "party" or "parties" shall include Governments and also persons permitted by these rules to take part in any proceedings before the Commission; the word "person" shall include individual, partnership, or corporation, and "oath" shall include affirmation.

Meetings

2. Regular sessions of the Commission shall be held annually at Washington beginning on the first Tuesday of April and at Ottawa beginning on the first Tuesday of October.

Special meetings may be held at such times and places in the United States and the Dominion of Canada as the chairman of the two sections may determine.

Chairmen

3. The commissioners of the United States section of the Commission shall appoint a chairman, to be known as the chairman of the United States section of the International Joint Commission, and he shall act as chairman at all meetings of the Commission held in the United States, and in respect to all matters required to be done in the United States by the chairman of the Commission.

The commissioners of the Canadian section of the Commission shall appoint a chairman, to be known as the chairman of the Canadian section of the International Joint Commission, and he shall act as chairman at all meetings of the Commission held in Canada, and in respect to all matters required to be done in Canada by the chairman of the Commission.

In case it shall be impracticable for the chairman of either section to act in any matter, then the commissioner of such section next in order of appointment shall act in his stead.

Permanent Offices

4. The permanent offices of the Commission shall be at Washington, in the District of Columbia, and at Ottawa, in the Dominion of Canada, and the secretaries of the United States and Canadian sections of the Commission shall, subject to the order of said respective sections, have full charge and control of said offices.

Duties of Secretaries

5. The secretaries shall act as joint secretaries at all sessions or meetings of the Commission, and each shall keep an accurate permanent record of the proceedings and preserve the same in the permanent offices of the Commission. It shall also be the duty of each of them to receive and file the applications and other papers properly presented to the Commission in any proceeding instituted before it, and to number in numerical order all such applications; and the number given an application shall be the file number for all papers and documents connected with such

application. Each secretary shall also keep in the permanent office under his control a docket, in which he shall record the title of the application or other proceeding, separately in each case, the date of filing of the same, the name and post-office address of the attorneys of record, and a brief statement of the contents, together with proper reference to the files of the original papers referred to in said docket. Each shall forward to the other for filing in the office of the other copies of all letters, documents or other papers received by him or filed in his office, pertaining to any matter before the Commission, to the end that there shall be on file in each office either the original or a copy of all official papers, documents, records and correspondence relating to matters at any time pending before the Commission.

Applications

6. In all cases to be submitted to the Commission under Articles III, IV and VIII of the treaty the method of bringing such cases to the attention of the Commission and invoking its action shall be as follows:

(a) Where one or the other of the Governments on its own initiative seeks the approval of the Commission for the use, obstruction or diversion of waters with respect to which under Articles III and IV of the Treaty the approval of the Commission is required, it shall file with the Commission an application setting forth as fully as may be necessary for the information of the Commission the facts upon which the application is based, and the nature of the order of approval desired.

(b) Where any private person seeks the approval of the Commission for the use, obstruction or diversion of such waters, he shall first make written application to the Government within whose jurisdiction the privilege desired is to be exercised, to grant such privilege, and upon such Government, or the proper department thereof, transmitting such application to the Commission, with the request that it take appropriate action thereon, the same shall be filed and be proceeded with by the Commission in the same manner as an application on behalf of one or the other of the Governments. All applications by private per-

sons should conform, as to their contents, to the requirements of subdivision (a) of this rule.

7. One duplicate original and 25 copies of the application shall be filed with each of the secretaries, and there shall be filed with each of the secretaries such drawings, profiles, and plans of survey on tracing linen, and such specifications and maps, as may be necessary to illustrate clearly the matter of the application.

8. In cases where either of the respective Governments shall have authorized the use, obstruction or diversion of navigable waters, all plans filed as aforesaid shall be accompanied with the approval thereof by the Government or proper department of the Government within whose jurisdiction such waters lie.

Notice and Publication

9. As soon as practicable after an application is made as hereinbefore in rule 6 provided for, the secretary of the section of the Commission appointed by the other Government shall forthwith send to such Government a notice in writing that the application has been made and a copy thereof.

The secretaries shall also, as soon as practicable after the application is made, cause to be published for three successive weeks in the Canada Gazette, and in two weekly newspapers, published one on each side of the international boundary line nearest the locality in which the use, obstruction, or diversion of waters is proposed to be made, a notice that the application has been made, and of the nature and locality of the proposed use, obstruction or diversion, and that all persons interested therein are entitled to be heard with respect thereto before the Commission.

Statement in Response to Application

10. Within 60 days after the filing of any such application the other Government, and with its consent any private person interested, may file a statement with the Commission setting forth any fact or facts bearing on the subject-matter of the application and tending to defeat or modify the order of ap-

proval sought, or to require that the same be granted on condition, and setting forth whether the order of approval is opposed in whole or in part, and, if in part only, to what extent, and if it be desired that the approval be on condition, setting forth the particular condition or conditions upon which it is thought the order of approval should be granted.

Statement in Reply

11. Immediately after such statement or statements are filed the secretary shall send a copy of the same to the Government which shall have made the application or shall have filed the application on behalf of private persons, and the said Government or the private persons on whose behalf the application shall have been filed, one or both, may, within thirty days, file a statement or statements in reply, and the issues to be determined by the Commission shall be gathered from the application, statement or statements and reply statement or statements.

Supplemental Applications and Statements

12. If it shall appear to the Commission that either the application, the statement, or the reply statement, is not sufficiently full, definite and complete to enable the Commission to proceed intelligently, the Commission may require a more full, definite and complete application or statement or reply statement, as the case may be, to be filed.

Interested Private Parties

13. Any person interested in the subject matter of the application, whether for or against, is entitled to be heard by counsel at the final hearing, and may, through counsel, with the consent of his Government, conduct or assist in conducting all proceedings in the case subsequent to the application.

Preliminary Hearing

14. If it appear to the Commission at any time before the hearing of the application that it would be advantageous to hold a preliminary meeting for the purpose of fixing or altering the

plan of hearing, determining the mode of conducting the inquiry, the admitting of certain facts, or the proof of them by affidavit, or for any other purpose, the Commission may hold such meeting upon such notice to the parties as it deems sufficient, and may thereupon make such orders as it may deem expedient.

Preliminary Communication with Parties

15. The Commission may, if it thinks fit, instead of holding the preliminary meeting provided in rule 14, communicate with the parties direct, and may require answers to such inquiries as it may consider necessary.

Production and Inspection of Documents

16. Either party shall be entitled, at any time, before or at the hearing of the case, to give notice in writing to the party in whose application or statement or reply statement reference is made to any document, map, plan, or profile, to produce it for the inspection of the party giving such notice or his attorney or solicitor, and to permit him to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put the same in evidence on his behalf in such proceedings, unless he satisfy the Commission that he had sufficient cause for not complying with such notice.

Subpoenas

17. Subpoenas for the attendance and examination of witnesses and notice for the production and inspection of documents may be issued in the first instance under the signature of the secretary of the section of the country in which the witnesses reside.

Compelling Attendance of Witnesses, etc.

18. All applications for subpoena or other process to compel the attendance of witnesses, or the production of books, papers, and documents before the Commission or the examiner, shall be made to the proper courts of either country, as the case may be, upon the order of the Commission or by the chairman of the

section of the Commission of the country in which the witnesses reside or the books, papers, or documents may be, or by the examiner appointed under rule 19.

Depositions

19. On application to the secretary of the section of the Commission in the country where depositions are proposed to be taken, any party may have a commission to take the depositions of witnesses, the commission to be signed by the secretary, to designate the name of the examiner before whom depositions will be taken, and the time and place of taking, but need not designate the names of witnesses to be examined, and the secretary shall specify in the commission the length of notice to be given, in all cases requiring what he may deem ample time to enable the parties to be present. The examiner, who shall in all cases be an official having power in his own country to administer oaths, may issue subpoenas for witnesses to be examined before him. The testimony of all witnesses shall be taken under oath or affirmation and the parties shall be entitled to attend and examine and cross-examine. The testimony so taken shall be confined to the subject matter in question, and any objection to the admission of evidence shall be noted by the examiner and dealt with by the Commission at the hearing. The examination shall take place within 60 days after the time provided in rule 11 for the filing of the reply statement. All examinations or depositions taken in pursuance of this rule shall be returned to the secretary who issued the commission, and the depositions certified under the hand of the examiner, without further proof, be used in evidence, saving all just exceptions. The examiner at the time and place appointed in the commission can take the depositions of witnesses offered by any party.

Final Hearings

20. The final hearings on applications shall be had at times and places to be fixed by the chairmen of the two sections not less than 60 days after the time provided for filing the reply statement, and the Commission will then hear oral and docu-

mentary evidence and evidence which may have been taken by the parties by deposition.

The Commission may require further evidence to be given, either *viva voce* or by deposition taken before an examiner.

The Commission may decide how many counsel are to be heard and what interests may be united for the purpose of the hearing.

The Commission may, in any case, require printed briefs or factums to be submitted by the parties.

The hearing of the case, when once commenced, shall proceed, so far as in the judgment of the Commission may be practicable, from day to day.

Printing of Briefs and Records

21. All briefs, factums, pleadings, and documents printed for the use of the Commission must be in such form and size, with ample margin, that they can be conveniently bound together so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than pica) and on unglazed paper.

Majority May Conduct Hearings

22. A majority of the Commission may conduct hearings or other proceedings regularly before it and may take and receive testimony and hear arguments thereon, but less than the whole number of the Commission shall not proceed to finally consider and determine any matter, proceeding, or question which the Treaty creating the Commission, either in terms or by implication, requires or makes it the duty of the Commission to decide.

Amendments

23. Amendments of applications and statements may be allowed by the Commission where substantial justice requires it, and the time for the filing of any paper or the doing of any act by these rules required may be extended in the like case.

Service of Process

24. Service of any subpoena, process, notice, or other document which must be served under the present rules, shall be by delivering a copy thereof to the person named therein, or by leaving the same at the dwelling house or usual place of abode or usual place of business of such person with some adult person who is a member of or resident in his family or with an employee in such place of business. Such service may be made by any literate person, who shall make return thereof under oath to the secretary from whom such subpoena, process, notice, or other document shall have been received, and such return shall state the time and place of such service.

Expenses of Proceedings

25. All expenses incident to the prosecution of any proceedings before the Commission or upon applications presented under subsection (b) of rule 6, including cost of publication of notices, service of subpoenas or other process, taking of testimony or depositions, witness fees, and all other expenses included in such proceedings, shall be paid by the party on whose behalf or at whose request such cost or expense is incurred.

Submission to Governments

26. When in the opinion of the Commission it is desirable that a decision should be rendered which affects navigable waters in a manner or to an extent different from that contemplated by the application and plans, the Commission will, before making a final decision, submit to the Government transmitting the application a draft of the decision, and such Government may file with the Commission a brief or memorandum thereon which will receive due consideration by the Commission before its decision is made final.

General Rule

27. The Commission may, in the course of the proceedings, make any order which it deems expedient and necessary to meet

the ends of justice and to effectually carry out the true intent and meaning of the Treaty.

Articles IX and X

28. The foregoing rules, as far as applicable, shall apply to proceedings in all cases referred or submitted under Articles IX and X.

Adopted February 2, 1912.

APPENDIX C

LAWS OF THE UNITED STATES

(Sundry civil appropriation act, June 25, 1910)

(Public—No. 266, 36 Stat. 384)

For the purpose of paying salaries and expenses and the one-half share of all reasonable and necessary joint expenses of the commission incurred under the terms of the treaty between the United States and Great Britain concerning boundary waters between the United States and Canada, signed January eleventh, nineteen hundred and nine, seventy-five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of State.

(Deficiency appropriation act, March 4, 1911)

(Public—No. 480, 36 Stat. 240)

Of the appropriation of seventy-five thousand dollars carried in the sundry civil appropriation Act for the fiscal year ending June thirtieth, nineteen hundred and eleven, concerning the boundary waters between the United States and Canada, five thousand dollars may be used for the rent of buildings in the District of Columbia from the date of the approval of said sundry civil act.

(Sundry civil appropriation act, March 4, 1911)

(Public—No. 525, 36 Stat. 285)

For salaries and expenses, including salaries of commissioners and salaries of clerks appointed by the commissioners on the part of the United States with the approval solely of the Secretary of State, including rental and furnishing, after the passage of this act, of offices at Washington, District of Columbia, and necessary traveling expenses, and for the one-half of all reasonable and necessary joint expenses of the International Joint

Commission incurred under the terms of the treaty between the United States and Great Britain concerning the use of boundary waters between the United States and Canada, and other purposes, signed January eleventh, nineteen hundrd and nine, seventy-five thousand dollars, together with the balance unexpended July first, nineteen hundred and eleven, of the appropriation made for said joint commission for the fiscal year nineteen hundred and eleven: *Provided*, That the salaries of the members of said commission on the part of the United States shall be fixed by the President, and the amount appropriated for the payment of salaries and other expenses hereunder shall be disbursed under the direction of the Secretary of State; that said commission or any member thereof shall have power to administer oaths and to take evidence on oath whenever deemed necessary in any proceeding or inquiry or matter within its jurisdiction under said treaty, and said commission shall be authorized to compel the attendance of witnesses in any proceedings before it or the production of books and papers when necessary by application to the circuit court of the United States for the circuit within which such session is held, which court is hereby empowered and directed to make all orders and issue all processes necessary and appropriate for that purpose.

LAWS OF THE DOMINION OF CANADA

LEGISLATION ENACTED BY THE PARLIAMENT OF THE DOMINION OF CANADA FOR THE PURPOSE OF CARRYING INTO EFFECT THE PROVISIONS OF THE TREATY OF JANUARY 11, 1909, CREATING THE INTERNATIONAL JOINT COMMISSION

(1-2 George V)

Chap. 28.—AN ACT Relating to the establishment and expenses of the International Joint Commission under the waterways treaty of January the eleventh, nineteen hundred and nine.

(*Assented to 19th May, 1911*)

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The treaty relating to the boundary waters and to questions arising along the boundary between Canada and the United States made between His Majesty and the said United States, signed at Washington the eleventh day of January, one thousand nine hundred and nine, and the protocol of the fifth day of May, one thousand nine hundred and ten, in the schedule to this act, are hereby confirmed and sanctioned.

2. The laws of Canada and of the several Provinces thereof are hereby amended and altered so as to permit, authorize, and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer, and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada.

3. Any interference with or diversion from their natural channel of any waters in Canada, which in their natural channels would flow across the boundary between Canada and the United States or into boundary waters (as defined in the said treaty) resulting in any injury on the United States side of the boundary, shall give the same rights and entitle the injured parties to the same legal remedies as if such injury took place in that part of Canada where such diversion or interference occurs; but this section shall not apply to cases existing on the eleventh day of January, one thousand nine hundred and nine, or to cases expressly covered by special agreement between His Majesty and the Government of the United States.

4. The exchequer court of Canada shall have jurisdiction at the suit of any injured party or person claiming under this act in all cases in which it is sought to enforce or determine as against any person any right or obligation arising or claimed under or by virtue of this act.

5. The International Joint Commission, when appointed and constituted pursuant to the said treaty shall have power, when holding joint sessions in Canada, to take evidence on oath and to compel the attendance of witnesses by application to a judge of a superior court of the Province within which such session is held, and such judge is hereby authorized and directed to

make all order and issue all processes necessary and appropriate to that end.

6. The governor in council may appropriate annually, out of the consolidated revenue fund, a sum not exceeding seventy-five thousand dollars toward the payment of the salaries of the commissioners to be appointed by His Majesty on the recommendation of the governor in council, as well as the salaries of the secretary and other officers and employees, and also all other expenses which may be incurred by such commissioners, with the approval of the minister of public works, together with one-half share of all reasonable and necessary joint expenses of the said commission incurred by it and, under the terms of the said treaty, required to be paid in equal moieties by the high contracting parties.

7. Each of the said commissioners who is appointed by His Majesty shall receive as compensation for his services an amount to be fixed by the governor in council, but not in any case to exceed the sum of seventy-five hundred dollars per annum. The secretary appointed by the Canadian section of the commission under the provisions of the said treaty shall receive as compensation for his services a sum not exceeding three thousand dollars per annum.

8. In addition to the said compensation the commissioners and secretary shall receive their actual traveling and other expenses necessarily incurred in connection with and in the course of the discharge of their official duties.

9. The commissioners may from time to time employ, subject to the approval of the minister of public works, such clerical and other assistance as is deemed advisable; their compensation and expenses to be fixed at such amounts as may be determined by the commissioners and approved by the minister of public works, and the commissioners are further authorized to expend an amount to be fixed by the minister of public works, not in excess of three thousand dollars per annum, for office accommodation, equipment, and supplies.

APPENDIX D

TREATY AND PROTOCOL BETWEEN CANADA AND THE UNITED STATES TO REGULATE THE LEVEL OF THE LAKE OF THE WOODS

SIGNED AT WASHINGTON, FEBRUARY 24, 1925; RATIFICATIONS
EXCHANGED, JULY 17, 1925

(United States Treaty Series, No. 721)

The United States of America, and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada,

Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of the United States and Canada the most advantageous use of the waters thereof and of the waters flowing into and from the Lake on each side of the boundary between the two countries, and

Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18th, 1917, on the reference concerning Lake of the Woods submitted to it by the Governments of the United States of America and Canada,

Have resolved to conclude a convention for that purpose and have accordingly named as their plenipotentiaries:

The President of the United States of America; Charles Evans Hughes, Secretary of State of the United States; and

His Britannic Majesty, in respect of the Dominion of Canada: The Honorable Ernest Lapointe, K. C., a member of His Majesty's Privy Council for Canada and Minister of Justice in the Government of that Dominion;

Who, having communicated to each other their full powers, found in good and due form, have agreed as follows:

Article I

In the present convention, the term "level of Lake of the Woods" or "level of the lake" means the level of the open lake unaffected by wind or currents.

The term "Lake of the Woods watershed" means the entire region in which the waters discharged at the outside of Lake of the Woods have their natural source.

The term "sea level datum" means the datum permanently established by the International Joint Commission at the town of Warroad, Minnesota, of which the description is as follows:

"Top of copper plug in concrete block carried below frost line, and located near fence in front of and to the west of new schoolhouse. Established October 3, 1912. Elevation, sea level datum, 1068.797."

"The International Joint Commission" means the commission established under the treaty signed at Washington on the 11th day of January, 1909, between the United States of America and His Britannic Majesty, relating to boundary waters and questions arising between the United States and Canada.

Article II

The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present convention, with the object of securing to the inhabitants of the United States and Canada the most advantageous use of the waters thereof and of the waters flowing into and from the Lake on each side of the boundary between the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes.

Article III

The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board, composed of engineers, which shall regulate and control the outflow of the waters of Lake of the Woods.

There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of the United States and one by the Government of Canada from their respective public services, and whenever the level of the lake of the lake rises above elevation 1061 sea level datum or falls below elevation 1056 sea level datum the rate of total discharge of water from the lake shall be subject to the approval of this board.

Article IV

The level of Lake of the Woods shall ordinarily be maintained between elevation 1056 and 1061.25 sea level datum, and between these two elevations the regulation shall be such as to ensure the highest continuous uniform discharge of water from the lake.

During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062.5 sea level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea level datum except during periods of low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes.

Article V

If in the opinion of the International Lake of the Woods Control Board the experience gained in the regulation of the lake under Articles III and IV, or the provision of additional facilities for the storage of waters tributary to the lake, demonstrates that it is practicable to permit the upper limit of the ordinary range in the levels of the lake to be raised from elevation 1061.25 sea level datum to a higher level and at the same time to prevent during periods of excessive precipitation the

extreme high level of the lake from exceeding elevation 1062.5 sea level datum, this shall be permitted under such conditions as the International Lake of the Woods Control Board may prescribe. Should such permission be granted, the level at which under Article III the rate of total discharge of water from the lake becomes subject to the approval of the International Lake of the Woods Control Board, may, upon the recommendation of that board and with the approval of the International Joint Commission, be raised from elevation 1061 sea level datum to a correspondingly higher level.

Article VI

Any disagreement between the members of the International Lake of the Woods Board as to the exercise of the functions of the board under Articles III, IV, and V shall be immediately referred by the board to the International Joint Commission whose decision shall be final.

Article VII

The outflow capacity of the outlets of Lake of the Woods shall be so enlarged as to permit the discharge of not less than forty-seven thousand cubic feet of water per second (47,000 c. f. s.) when the level of the lake is at elevation 1061 sea level datum.

The necessary works for this purpose, as well as the necessary works and dams for controlling and regulating the outflow of the water, shall be provided for at the instance of the Government of Canada, either by the improvement of existing works and dams or by the construction of additional works.

Article VIII

A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easements.

The Government of the United States shall provide for the following protective works and measures in the United States

along the shores of Lake of the Woods and the banks of Rainy River, in so far as such protective works and measures may be necessary for the purposes of the regulation of the level of the lake under the present convention: namely, the removal or protection of buildings injuriously affected by erosion, and the protection of the banks at the mouth of Warroad River where subject to erosion, in so far in both cases as the erosion results from fluctuations in the level of the lake; the alteration of the railway embankment east of the town of Warroad, Minnesota, in so far as it may be necessary to prevent surface flooding of the higher lands in and around the town of Warroad; the making of provision for the increased cost, if any, of operating the existing sewage system of the town of Warroad, and the protection of the waterfront at the town of Daudette, Minnesota.

Article IX

The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present convention.

Article X

The Governments of the United States and Canada shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles VII, VIII and IX.

In consideration, however, of the undertakings of the United States as set forth in Article VIII, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars (\$275,000) in currency of the United States. Should this sum prove insuf-

ficient to cover the cost of such undertakings one-half of the excess of such cost over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present convention, be paid by the Government of Canada.

Article XI

No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except by authority of the United States or the Dominion of Canada within their respective territories and with the approval of the International Joint Commission.

Article XII

The present convention shall be ratified in accordance with the constitutional methods of the high contracting parties and shall take effect on the exchange of the ratifications, which shall take place at Washington or Ottawa as soon as possible.

In faith whereof the above named plenipotentiaries have signed the present convention and affixed thereto their respective seals.

Done in duplicate at Washington, the 24th day of February, 1925.

(SEAL) CHARLES EVANS HUGHES

(SEAL) ERNEST LAPOINTE

PROTOCOL ACCOMPANYING CONVENTION TO REGULATE THE
LEVEL OF LAKE OF THE WOODS

At the moment of signing the convention between the United States of America, and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, regarding the regulation of the level of Lake of the Woods, the undersigned plenipotentiaries have agreed as follows:

1. The plans of the necessary works for the enlargement of the outflow capacity of the outlets of Lake of the Woods provided for in Article VII of the convention, as well as of the

necessary works for controlling and regulating the outflow of the water, shall be referred to the International Lake of the Woods Control Board for an engineering report upon the suitability and sufficiency for the purpose of permitting the discharge of not less than forty-seven thousand cubic feet of water per second (47,000 c. f. s.) when the level of the lake is at elevation 1061 sea level datum. Any disagreement between the members of the International Lake of the Woods Control Board in regard to the matters so referred shall be immediately submitted by the board to the International Joint Commission whose decision shall be final.

2. Should it become necessary to set up a special tribunal to determine the cost of the acquisition of the flowage easement in the United States provided for in Article VIII of the convention, the Government of Canada shall be afforded an opportunity to be represented thereon. Should the cost be determined by means of the usual judicial procedure in the United States, the Government of Canada shall be given the privilege of representation by counsel in connection therewith.

3. Since Canada is incurring extensive financial obligations in connection with the protective works and measures provided for in the United States along the shores of Lake of the Woods and the banks of Rainy River, under Article VIII of the convention, the plans, together with the estimates of cost, of all such protective works and measures as the Government of the United States may propose to construct or provide for within five years of the coming into force of the convention shall be referred to the International Lake of the Woods Control Board for an engineering report upon their suitability and sufficiency for the purpose of the regulation of the level of the lake under the convention. Any disagreement between the members of the International Lake of the Woods Board in regard to the matters so referred shall be immediately submitted by the board to the International Joint Commission whose decision shall be final.

4. In order to ensure the fullest measure of cooperation between the International Lake of the Woods Control Board and

the Canadian Lake of the Woods Control Board provided for in Article III of the convention, the Government of Canada will appoint one member of the Canadian Board as its representative on the International Board.

5. Until the outside of Lake of the Woods have been enlarged in accordance with Article VII of the convention, the upper limit of the ordinary range in the levels of the lake provided for in Article IV of the convention shall be elevation 1060.5 sea level datum, and the International Lake of the Woods Control Board may advise the Canadian Lake of the Woods Control Board in respect of the rate of total discharge of water from the lake which may be permitted.

In faith whereof the undersigned plenipotentiaries have signed the present protocol and affixed thereto their respective seals.

Done in duplicate at Washington the 24th day of February, 1925.

(SEAL) CHARLES EVANS HUGHES

(SEAL) ERNEST LAPOINTE

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